Supreme Court, U.S.
FILED

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No. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP,
Petitioner,

v.

MAXWELL HOUSE COFFEE COMPANY,
KRAFT GENERAL FOODS, INC.,
VISTA CHEMICAL COMPANY, ENTERPLAST, INC.,
AND H. MUEHLSTEIN & CO., INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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85 pp

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 96-20441

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,
Plaintiff,

LOCKWOOD WAREHOUSE & STORAGE, ET AL,
Defendants,

MAXWELL HOUSE COFFEE COMPANY, KRAFT GENERAL FOOD, INC.,
Defendants — Appellants

v.

KRAFT GENERAL FOODS, INC.; GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP; THIRD COAST PACKAGING; IGI BAYCHEM, INC.; OXID, INC.; RDA INTERNATIONAL, INC.; VISTA CHEMICAL,
Defendants — Appellees

v.

Enterplast, Inc.; H. Muehlstein & Co.,
Intervenor Defendants — Appellants.

Appeals from the United States District Court for the Southern District of Texas

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Before POLITZ, and DEMOSS, Circuit Judges, and JUSTICE,* District Judge.

JUSTICE, District Judge:

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* District Judge of the Eastern District of Texas, sitting by designation.

This appeal arises out of an interpleader action brought by Marine Indemnity Insurance Company of America ("Marine Indemnity") to resolve conflicting claims for insurance proceeds under an insurance policy issued by it to Lockwood Warehouse & Storage ("Lockwood"). The district court, upon recommendation of a special master, determined the issues of insurable interests, calculation of damages, and priority of claims, and entered final judgment. Defendants Maxwell House Coffee Company ("Maxwell") and Kraft General Foods, Inc. ("Kraft"), in addition to intervenor-defendants Enterplast, Inc. ("Enterplast") and H. Muehlstein & Company ("Muehlstein"), appeal the district court's order and seek review of its interpretation of the Marine Indemnity insurance policy. We affirm in part and reverse in part the district court's judgment.

I. Proceedings Below

In November 1993, a fire destroyed a warehouse owned by Grand Lockwood Partners Limited Partnership ("Grand Lockwood"). It was managed and leased by Lockwood at the time of the fire. Property worth millions of dollars that was stored in the warehouse was also destroyed by the fire. Lockwood maintained insurance coverage with Marine Indemnity for certain property inside the warehouse. Numerous owners of property stored inside the warehouse made claims against Marine Indemnity for the value of their damaged property. Because the claims exceeded the limits of the insurance policy, Marine Indemnity instituted this interpleader action.

In October 1995, the district court determined that the amount of insurance available under the Marine Indemnity policy was $1,275,610, plus accrued interest. The court ordered that Marine Indemnity pay this amount into the court's registry. The district court appointed a magistrate judge to act as special master and recommend findings of facts and conclusions of law on the issues of insurable interests, calculation of damages, and priority of claims. Issues concerning the causation of the fire and the liability

of the parties are the subjects of a separate proceeding pending in a Texas state court action. After holding a hearing on the parties' conflicting claims to the interpleaded funds and considering briefs submitted by the parties setting forth their respective positions, along with affidavits, documents, and deposition excerpts, the special master issued her report,[1] which the district court adopted. On March 4, 1996, after considering various motions and objections to the special master's report, the district court entered final judgment ordering the disbursement of the interpleaded funds. Kraft subsequently filed a motion for new trial which was denied. This appeal followed.

This appeal raises two primary disputes concerning the district court's disbursement of the Marine Indemnity insurance proceeds. First, intervenor-defendants Enterplast and Muehlstein object to the district court's order denying them any recovery from the interpleaded funds. Second, defendants Kraft, Maxwell, and Vista Chemical Company, who all recovered only a portion of their uninsured losses under the court's allocation of policy proceeds, contest the district court's award from the interpleaded funds, of $158,430.76, plus accrued interest, to Grand Lockwood, for the costs Grand Lockwood incurred in removing debris from the warehouse and cleaning up the warehouse property site. Each of these claims shall be addressed, in turn, below.

II. Analysis

A. Enterplast and Muehlstein's Right to Recover

The special master found two independent bases for denying both Enterplast and Muehlstein any recovery from the interpleaded funds. First, the court found that, given Enterplast's and Muehlstein's bailment relationship with sublessees of Lockwood, the Marine Indemnity policy provisions governing covered property barred the two entities from recovery. Lockwood had sub-

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[1] The special master also issued an errata sheet which she incorporated into her report and recommendation and which corrected several factual errors contained in the report.

leased space in the warehouse to Ultra Warehouse ("Ultra") and Lance Cowan, doing business as Shippers International ("Shippers"), who each stored, respectively, the property of Muehlstein and Enterplast.

The Marine Indemnity policy provided coverage of the following property:

> (A) Personal Property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal Property of others which is directly connected with the Insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to loss to insure.
>
> (C) Real Property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the insured.

The special master determined that the policy had three coverage requirements with respect to the property belonging to those other than Lockwood that was stored in the warehouse. First, the property must have been "directly connected" with Lockwood's business. Second, the property must have been in the "care, custody, or control" of Lockwood. Third, Lockwood must either have been "responsible" for the property or have had agreed in writing, prior to the fire, to insure the property. In construing the first requirement, the special master determined that the policy covered the property of those who stored property directly with Lockwood, but did not cover the property of those, including Enterplast and Muehlstein, who stored property with a sublessee of Lockwood. Because Enterplast and Muehlstein did not enter into an agreement with Lockwood for the storage of property, the court adjudged that neither entity could establish that it had a direct relationship or involvement with Lockwood, and thus also

concluded that their property could not be found to have been "directly connected" with Lockwood's business.

The special master also found that the third coverage requirement barred Enterplast and Muehlstein from recovery under the Marine Indemnity policy, in that they failed to establish that Lockwood was "responsible" for their property. Evidence was presented to the court that Muehlstein entered into a warehouseman's agreement with Ultra for the storage of its property. Under this agreement, Ultra disavowed responsibility for loss or damage to Muehlstein's goods, however caused. Moreover, evidence was adduced that Ultra and Shippers each entered into a sublease agreement with Lockwood, which stated, in each instance, that the sublease incorporated all terms and conditions of the master lease between Grand Lockwood and Lockwood. The master lease provided:

> Lessor and Lessee, in their own behalf and in behalf of their insurers, each hereby waive any and all claims which such party may have against the other party during the Term for any and all loss of, or damage to, any of such party's property located within or upon, or constituting a part of the Leased Premises or the Building to the extent that such loss or damage is or could have been covered by a standard Texas fire and extended coverage insurance policy, regardless of cause or origin, including the negligence (sole or otherwise), of such party hereto.

Since Ultra's and Shippers' leases with Lockwood, by incorporating the terms of the master lease, exonerated Lockwood and its insurers from any damage claims for Ultra's and Shippers property, the special master concluded that, based on these waiver of liability provisions, Lockwood was not responsible for the goods of Ultra and Shippers or the goods of their bailees, including Muehlstein and Enterplast.

The district court held that, even if it were to reject the incorporation of the master lease's waiver of liability provision,

Lockwood was not "responsible" for Muehlstein's and Enterplast's property, pursuant to the Texas law of leases and bailments. Under Texas law, a bailment is a delivery of goods to another which creates a duty of trust on the part of the bailee to return the deposited goods as directed. *Braniff Airways, Inc. v. Exxon Co. U.S.A.*, 814 F.2d 1030,1038 (5th Cir. 1987). A bailee has the duty to exercise ordinary care over the goods and is therefore "responsible" for the bailor's goods. *Allright, Inc. v. Elledge,* 515 S.W.2d 266, 267 (Tex. 1974); *Ampco Auto Parks, Inc. v. Williams,* 517 S.W.2d 401, 403 (Tex. Civ. App. — Dallas 1974, writ ref'd n.r.e.); *West v. Slaughter,* 384 S.W.2d 185, 187 (Tex. Civ. App. — Waco 1964, writ ref'd n.r.e.). In contrast, a lease is "a transfer of interest in and possession of property for a prescribed period of time in exchange for an agreed consideration called 'rent.'" *State Nat'l Bank v. United States,* 509 F.2d 832, 835 (5th Cir. 1975). The lessor has the duty of ordinary care in maintaining the premises it controls, but does not have a duty to exercise care regarding the lessee's property stored on the premises. *See Jones v. Houston Aristocrat Apartments, Ltd.,* 572 S.W.2d 1 (Tex. Civ. App. — Houston [1st Dist.] 1978, writ ref'd n.r.e.). The lessor is therefore not "responsible" for the property of the lessee. The district court found that the sublease agreement between Ultra and Lockwood, and also that between Shippers and Lockwood, established a lessor-lessee relationship. Consequently, the court found that, under Texas law, Lockwood was not responsible for the property of Ultra or Shippers, or the property of their bailors, Muehlstein and Enterplast.

The special master also denied recovery to Muehlstein and Enterplast, based on its finding that Muehlstein's and Enterplast's losses were covered by the Marine Indemnity policy's "other insurance" clause, which, together with considerations of equity, foreclosed recovery. The "other insurance" clause provided: "If at the time of loss, or damage, there is available to a named or unnamed insured or any other interested party any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance

over such other insurance." The court then held that, because the amount of claims to the policy exceeded the amount of interpleaded funds, those claimants who were not covered by other insurance should have first priority to the funds.

Muehlstein, the court found, lost $547,546.63 worth of goods in the fire and suffered a net sales loss of $1,078,233. The court concluded that, since Muehlstein recovered $750,000 from its own insurance company, Phoenix Assurance, Muehlstein had been fully compensated for the loss of its goods by other insurance, and, therefore, could not recover additional money from the interpleaded funds. Muehlstein objected to this finding in the special master's report and recommendation, maintaining that the majority of the proceeds it received from Phoenix Assurance covered its lost profits, but did not cover the value of its lost inventory. In this connection, Muehlstein contends that it suffered an uninsured loss of $1,078,233 minus $750,000, or $328,233. The district court overruled Muehlstein's objection, but did not directly address Muehlstein's claim regarding lost profits.

The court also found that Enterplast was fully compensated for the actual cash value of its property. Enterplast submitted a claim of $370,502 for the loss of its goods in the fire, of which its insurance carrier paid $347,911.49. It was also determined by the court that Enterplast had stored goods in the warehouse with a fair market value of $339,445. Enterplast did not object to the court's factual findings. Instead, Enterplast objected to the court's decision that those entities storing uninsured property in the warehouse with uninsured claims had first priority to the interpleaded funds. The district court overruled Enterplast's objection.

Enterplast and Muehlstein argue on appeal that the district court erred in denying them recovery of the interpleaded funds. They contend that they meet all three prerequisites to recovery under the Marine Indemnity policy: first, that the goods they stored in the warehouse were directly connected with Lockwood's business; second, that the goods were in the care, custody, or control of Lockwood; and finally, that Lockwood was responsible

for the goods. Further, Muehlstein argues that the district court erred in concluding that Muehlstein did not suffer an uninsured loss, and therefore fell into error in denying it recovery on this basis.

We review conclusions of law *de novo*. *Phillips Petroleum Co. v. Best Oilfield Services, Inc.*, 48 F.3d 913, 915 (5th Cir. 1995). We review the factual findings of the special master, adopted by the district court, for clear error. Fed. R. Civ. P. 52(a); *see also Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.25 (5th Cir. 1992). The district court's finding concerning the priority of claims (to the extent that the priority of claims was not controlled by policy language or controlling law) is neither a conclusion of law nor a factual finding, but is, instead, an equitable decision. *See Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255, 1261 (5th Cir. 1982) ("In determining the order of distribution of the interpleaded funds, we sit as a court of equity, and possess the remedial flexibility of a chancellor in shaping our decree so as to do complete equity between the parties."); *see also American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) ("[I]t is well recognized that interpleader is an equitable remedy. . . ."); *Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 583 (5th Cir. 1968) ("Interpleader generally is a suit in equity which invokes equitable principles."). Hence, we review the priority of claims finding for abuse of discretion. Based on these standards of review, we affirm the district court's judgment barring Muehlstein and Enterplast from recovery of the interpleaded funds. Specifically, we affirm the district court's holding that Lockwood was not responsible for the property of Muehlstein and Enterplast under the Marine Indemnity policy. Further, we find that the court did not commit clear error in finding that Muehlstein and Enterplast were fully compensated for their losses, and that the court did not abuse its discretion in ruling that those with uninsured losses should receive priority over Muehlstein and Enterplast to the limited interpleaded funds.

1. *Lockwood's responsibility under the insurance contract.* Both Muehlstein and Enterplast contend, on appeal, that

Lockwood was responsible for their property by the terms of the insurance policy, since it maintained control over the warehouse: that is, by directing and performing warehouse maintenance, repairs, security, housekeeping, and fire protection, among other things, Lockwood thereby assumed obligations and duties with regard to all property in the warehouse. Muehlstein and Enterplast argue that the negligent performance of these duties by Lockwood rendered it, as landlord, liable, and hence responsible, for the destruction to their property.

We agree with the district court that Texas law, which governs this case, does not support the bailors' interpretation of the term "responsible" in the insurance contract. Pursuant to Texas law, responsibility for goods is dependent on the existence of a bailor-bailee relationship. A bailee, in contrast to a lessor, assumes a duty of care with regard to both the premises and the goods in its possession. As a lessor, Lockwood had a duty to exercise care respecting the portions of the warehouse it controlled,[2] but did not have a general duty to exercise care as to the sublessees' property stored on the premises or care with relation to the property of the sublessees' bailors. Thus, as lessor, Lockwood was not responsible for the property of the Muehlstein and Enterplast.

In support of its argument, Enterplast cites to the case of *Brown v. Frontier Theaters, Inc.*, 369 S.W.2d 299 (Tex. 1963). In *Brown,* the Texas Supreme Court held that, if a landlord retains control over a portion of the leased premises, "the landlord is charged with the duty of ordinary care in maintaining the portion retained so as to not damage the tenant." *Id.* at 303. Frontier Theaters was found to be in control of the upper portion of the

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[2] Texas law provides that, "[g]enerally, a landlord who retains control over a part of the premises that the tenant is entitled to use owes a duty to exercise ordinary care" over such commonly used premises. *Stein v. Gill,* 895 S.W.2d 501, 502 (Tex. App. — Fort Worth 1995, no writ). Because we find that, regardless of whether Lockwood exercised control over the warehouse premises, Lockwood was not responsible for the property of Muehlstein and Enterplast, we need not and do not rule on the issue of Lockwood's control and corresponding duty of care over the premises.

trate Stacy issued an Errata Sheet Supplementing the Special Master's Report and Recommendation (Instrument #170) on February 6, 1996 which corrected a few typographical and computational errors in the report and recommendation.

The background of this case is presented in the report and recommendation so the Court will not recite it here. The Marine Indemnity insurance policy at issue in this case provides for coverage of:

> (A) Personal property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal property of others which is directly connected with the insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to the loss to insure.
>
> (C) Real property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the Insured.

Based on this policy language, Magistrate Stacy determined that in order to be entitled to any of the interpled funds to cover property loss in the warehouse fire, each claimant had to establish that its property loss was directly related to Lockwood's business while in the care, custody, or control of Lockwood and that Lockwood was responsible for the property or Lockwood had agreed in writing to insure the property prior to the time of the loss. Instrument #153 at 23. Magistrate Stacy also concluded that Lockwood owed no duty towards property belonging to those parties who simply had sublease relationships with Lockwood as opposed to bailment relationships. *Id.* at 28. Magistrate Stacy also concluded that in keeping with the equitable nature of an interpleader action, *Great Am. Ins. Co. v. Spraycraft, Inc.*, 844 F. Supp. 1188, 1191 (S.D. Ohio 1994), the other insurance clause in the Marine Indemnity policy should be applied to not allow

parties who were already compensated for their loss by other insurance to recover additional money from the interpled funds. Instrument #153 at 42-47. Applying these requirements to each parties' loss, Magistrate Stacy was able to determine the total amount of claims recoverable under the policy and the pro rata distribution of the funds to the eligible parties.

The Court has reviewed the submissions of the parties, the applicable law, and the report and recommendation. The Court is in agreement with Magistrate Stacy's determination and application of law in this case. However, before ruling on the report and recommendation, the Court will first consider the various motions and objections filed in response to the report and recommendation.

1. Ultra's Motion to Amend (Instrument #156) and Objection to Report and Recommendation (Instrument #157)

On January 12, 1996, Ultra filed its motion to amend the report and recommendation and objection to the report and recommendation. Ultra seeks to have paragraph C.1 of the Conclusion of Law on Insurable Interest amended to indicate that Lockwood was responsible for Ultra's property in the warehouse and Ultra, therefore, has an uninsured loss of $8897.00. Magistrate Stacy determined that since Ultra's relationship with Lockwood was based on a sublease and since the sublease incorporated the insurance terms of the master lease which exonerated Lockwood and its insurers from any property damage claims, Lockwood was not responsible for Ultra's property. Instrument #153 at 35. Ultra argues that Magistrate Stacy erred with respect to this legal conclusion. Ultra claims that the sublease only incorporates "applicable" terms and conditions of the master lease and that the waiver clause at issue was not "applicable" to the sublease. Alternatively, Ultra argues that if the waiver clause is "applicable," then the waiver did not comply with the fair notice requirements of conspicuousness to be effective as to Ultra. Ultra also contends that, under Texas law, Lockwood owed Ultra a duty to

maintain the portions of the warehouse within its control in such a manner as to not damage Ultra's property. It is clear that Ultra's only objections are to the Magistrate's conclusions and application of law. Ultra has not challenged any factual determinations.

Even if the Court were to accept Ultra's argument that the waiver clause is not binding on it, Ultra still would not be entitled to the interpled funds. The Court agrees with Magistrate Stacy's interpretation of Texas case law that a lessor owes a duty with respect to the leased premises but there is no inherent or implied duty of a lessor with respect to the personal property of a lessee. This bars Ultra from recovery because it cannot show that its property was in the care of Lockwood or that Lockwood was responsible for it. Therefore, Ultra's motion to amend should be denied and its objection overruled.

2. Muehlstein's Objection to Report and Recommendation (Instrument #158) and Motion to Amend (Instrument #159)

Initially, Muehlstein has pointed out a typographical error in Finding of Fact No. 50 in the report and recommendation. The errata sheet issued by Magistrate Stacy has corrected the Finding of Fact to state that Muehlstein stored packaged plastic materials with a cost of $547,546.63 at the warehouse. *See* Instrument #170. Muehlstein concedes that it received $750,000.00 from its own insurance company but claims the proceeds covered Muehlstein's lost profits, as opposed to inventory. Therefore, Muehlstein claims that its has an uninsured loss of $547,546.63. Muehlstein had a contract with Ultra whereby Ultra stored goods for Muehlstein. Muehlstein believes that its property loss should be covered under the Marine Indemnity policy because Lockwood was in the business of storing and running a warehouse and Muehlstein's loss was directly related to Lockwood's business.

Muehlstein's recovery is directly related to Ultra's being able to recover. As discussed in the previous section, Ultra cannot recover under the policy. Muehlstein cannot recover either because

Lockwood was not responsible for Muehlstein's property. Therefore, Muehlstein's motion to amend should be denied and its objection overruled.

3. Kraft and IGI Baychem's Objections To Report and Recommendation (Instrument #160)

Kraft General Foods, Inc. ("Kraft") and IGI Baychem, Inc. ("IGI Baychem") have filed a joint objection to the report and recommendation wherein they agree with Magistrate Stacy's classification of Kraft and IGI Baychem. They believe, however, that they should be given priority over the other claimants in their class because they are the only parties with written agreements with Lockwood to provide insurance coverage. Kraft and IGI Baychem also argue that Lockwood Partners should not be allowed to recover for its costs of debris removal because the debris removal clause in the Marine Indemnity policy only applies to removal costs of the insured, Lockwood, not Lockwood Partners.

Kraft and IGI Baychem's argument with respect to their receiving first priority because they had written agreements with Lockwood for insurance would result in giving priority to them over parties who had oral agreements. However, it is well settled that oral agreements and written agreements should be given equal priority. *Tillerson v. Highrabedian,* 503 S.W.2d 398, 400 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref. n.r.e.). Therefore, the Court will overrule Kraft and IGI Baychem's objection on priority.

With respect to Kraft and IGI Baychem's argument that Lockwood Partners cannot recover for the debris removal or alternatively for the full amount of the debris removal, Lockwood Partners has pointed out that Kraft and IGI Baychem are relying on one of two debris removal provisions in the Marine Indemnity policy. Lockwood Partner's has shown that in the July 6, 1993 endorsement to the policy, the debris removal clause was extended to cover "costs of clean up, at the premises of the Assured,

made necessary as a result of such direct physical loss or damage . . . ." Instrument #165 at 2; Instrument #116, Exhibit D. Based on this provision of the policy, Kraft and IGI Baychem's objections to Lockwood Partners' recovery for debris removal should be overruled.

4. Kraft's Objections to Report and Recommendation (Instrument #161)

Kraft filed an additional objection to the Report and Recommendation four days after the previous objection presenting the same argument about Lockwood Partners not being an insured under the policy. Kraft also argues that the debris removal clause only covers removal of property that was covered by the policy, but Lockwood Partners only presented evidence of the cost for removing all the debris without differentiation between property covered and property not covered.

Additionally, Kraft objects to Magistrate Stacy's failure to require Marine Indemnity to deposit an additional $56,390 with the Court because Marine Indemnity's earlier payment to Lockwood for Lockwood's loss to betterments and improvements at the warehouse was made in bad faith. The Court, however, will summarily overrule this objection because Marine Indemnity has been dismissed from this case in response to an unopposed motion to dismiss.

In accordance with the discussion of the debris removal coverage in the previous section, Kraft's objection to Lockwood Partners' recovering for its costs incurred in debris removal should be overruled.

5. Simpson Paper's Objection to Report and Recommendation (Instrument #162)

Simpson Paper Company and Simpson Pasadena Paper Company (collectively "Simpson") filed an objection to the report and recommendation. Simpson believes that Magistrate Stacy erred holding that Simpson was not connected to Lockwood since

Simpson's contract was with Ultra. Simpson believes that its presence of goods in the warehouse was a direct and foreseeable consequence of the lease between Ultra and Lockwood. Therefore, Simpson contends its loss occurred in direct relation to Lockwood's business and should be covered by the policy. Simpson also argues that Lockwood's duty of care to it is unaffected by Ultra's waiver in its lease with Lockwood of its right to recover damages because Lockwood's duty to Simpson arose from common law and not by virtue of Ultra's lease.

As discussed earlier, a party has to establish that Lockwood was responsible for its goods to recover under the policy. Simpson's presence in the warehouse was pursuant to a bailment agreement with Ultra. Since Ultra cannot recover under the policy, Simpson cannot either. Accordingly, Simpson's objection should be overruled.

6. Enterplast's Objection to Report and Recommendation (Instrument #163)

Enterplast, Inc. ("Enterplast") filed an objection to the report and recommendation wherein it objects to the determination that Enterplast's goods were directly related to Lockwood's business and that Magistrate Stacy's conclusion that Texas case law which addresses other insurance clauses does not apply in this case. Enterplast presents the same argument as the other objecting parties by arguing that Lockwood was in the business of storing property and so all property in the warehouse was directly related to Lockwood's business. With respect to its other insurance clause argument, Enterplast urges the Court to apply the general rule in *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange,* 444 S.W.2d 583 (Tex. 1969), and determine that it has a pro rata claim based on its own insurance and the Marine Indemnity policy and allow it to recover its pro rata share of the interpled funds.

The Court has reviewed Magistrate Stacy's legal analysis and conclusion that *Hardware Dealers* does not apply to this case and

concurs with this conclusion. Therefore, the objection should be overruled.

7. Lockwood Partners' Motion to Amend (Instrument #164) and Motion to Reform (Instrument #165)

Lockwood Partners' basis for these motions is to correct a typographical error in the report and recommendation. In the errata sheet, Magistrate Stacy corrected the typographical error to indicate that Lockwood Partners had damages of $379,000. Therefore, Lockwood Partners' motions should be denied as moot.

It is important to note that none of the parties have objected to any factual determinations made by Magistrate Stacy. The parties do not contest the valuation or the factual circumstances surrounding the parties' relationships. All of the objections to the report and recommendation which have been filed by the parties are directed exclusively at legal issues. There are not any factual issues in dispute. Therefore, the Court can enter judgment in this case without any further proceedings. Since the various objections of the parties have been overruled and the Court finds the Magistrate's report and recommendation, supplemented by the errata sheet, to be proper, the Court will adopt the report and recommendation as the opinion of the Court.

Accordingly, the Court hereby

ORDERS that the parties' objections to the Report and Recommendation are **OVERRULED**; and

ORDERS that Ultra's motion to amend is **DENIED**; and

ORDERS that Muehlstein's motion to amend is **DENIED**; and

ORDERS that Lockwood Partners' motion to amend and motion to reform the recommendations are **DENIED as moot**; and further

ORDERS that Magistrate Stacy's Report and Recommendation and Errata Sheet Supplementing the Special Master's Report and Recommendation are **ADOPTED** as the opinion of this Court.

SIGNED at Houston, Texas this, 28th of February 1996.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE,	§
Plaintiff,	§
	§
V.	§
	§
LOCKWOOD WAREHOUSE & STORAGE, THIRD COAST PACKAGING, SNAVELY FOREST PRODUCTS, INC., MICHAEL DURHAM, IGI BAYCHEM, INC., INTEGRATED LABS, ATLANTIS INTERNATIONAL COMMODITIES, INC., OXID, INC., R.D.A. INTERNATIONAL, INC., VISTA CHEMICAL,, PHOENICIAN ENTERPRISES, INC., MAXWELL HOUSE COFFEE COMPANY, SHIPPERS INTERNATIONAL, INC., CXI, INC., ULTRA WAREHOUSE, INC., CITATION CORPORATION, FRITZ COMPANIES, INC., GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP, and INTEGRATED FURNITURE & EQUIPMENT,	§
Defendants.	§

SPECIAL MASTER'S REPORT AND RECOMMENDATION

Pursuant to Rule 53 of the Federal Rules of Civil Procedure, the Magistrate Judge was appointed as a Special Master in this Case. According to the Order of reference, the Master was instructed to consider the issues of insurable interest, calculation

of damages and priority of claims. After considering the parties' submissions, the evidence and argument received at a hearing held on November 13, 1995, the following report is submitted.

I. PROCEDURAL HISTORY

The facts surrounding this interpleader action are not in dispute. On November 8, 1993, fire destroyed an entire warehouse owned by Grand Lockwood Partners Limited Partnership ("the Partnership") and managed by Lockwood Warehouse & Storage ("Lockwood"). Property stored in the warehouse was also destroyed by the fire. Although Lockwood had insurance on the warehouse and its contents, the amount of the insurance available was not sufficient to cover all the losses claimed. On July 18, 1994, Plaintiff Marine Indemnity Insurance Company of America ("Marine Indemnity"), Lockwood's insurer, instituted the instant interpleader action. In its Interpleader Complaint, Marine Indemnity alleged:

> Marine Indemnity insured Lockwood under an inland-marine policy which covers specified risks of loss to property in Lockwood's care, custody or control and for which Lockwood is responsible and for personal property of others which Lockwood agreed in writing to insure .... As a result of the fire, Lockwood and the owners of the property have made conflicting demands on Marine Indemnity for payment .... Because of these conflicting demands, Marine Indemnity is exposed to potentially inconsistent obligations and liability under the policy and brings this action to interplead the remaining limits of insurance.

Complaint for Interpleader at 5-6. On October 3, 1995, United States District Judge Melinda Harmon determined that the amount of insurance available for the Defendants under the Marine Indemnity policy was $1,275,610, plus accrued interest. On that same date, Judge Harmon appointed United States Magistrate Judge Frances H. Stacy as a Special Master, directing her to submit a report within 90 days, on the issues of "insurable

interests, calculation of damages and priority of claims." Memorandum and Order of October 3, 1995.

II. ISSUES

As per the District Judge's reference, the following issues are before the Master for a recommendation:

1. insurable interests;
2. calculation of damages; and
3. priority of claims.

There is no real dispute between the parties as to each claimant's alleged losses. There is, however, great dispute on the insurability of the parties' interests and the priority of the parties' claims.

As to the insurable interest issue, those Defendants who leased space in the warehouse directly from Lockwood or paid Lockwood directly for storing their goods in the warehouse contend that they have a valid interest in the interpled funds, while those who subleased space or stored their goods with a party other than Lockwood do not. In contrast, those who subleased space or stored their goods with other parties argue that because Lockwood had "care, custody and control" over all the goods in the warehouse, they also have a valid interest in the interpled funds.

As to the priority of claims issue, Defendants have suggested three theories. The first is based on the amount and existence of insurance other than that provided by the Marine Indemnity policy. Those Defendants who favor this theory argue that claims which are not covered by insurance other than the Marine Indemnity insurance should have priority over claims which are completely covered by other insurance. This theory is based on the language in the Marine Indemnity Policy which makes the Marine Indemnity insurance excess to any other available insurance. The second theory is that claims of Defendants who had a written lease or storage agreement with Lockwood in which Lockwood agreed to maintain insurance on property being stored

in the warehouse, should have priority over claims of Defendants who did not have a written lease or storage agreement and were not given written assurances that insurance would be maintained. Under this theory, those Defendants who had written contracts with Lockwood which provided for insurance would have first priority; those with oral contracts with Lockwood which included promises of insurance coverage would have second priority; and those who did not lease or store their goods directly with Lockwood, would have last priority. The third theory is that Defendants who leased warehouse space or stored their goods directly with Lockwood should have priority over those who subleased space or stored their goods with others, without regard to whether their lease or storage agreements were written or oral. In addition, all Defendants other than Grand Lockwood Partners Limited Partnership argue that Grand Lockwood Partners Limited Partnership should be given last priority in light of the allegations that it was its negligence or contributory negligence which caused the fire at the Lockwood warehouse.

III. THE CLAIMANTS/DEFENDANTS

Marine Indemnity named the following parties as Defendants in this Interpleader action: 1) Lockwood Warehouse and Storage; 2) Third Coast Packaging; 3) Snavley Forest Products, Inc.; 4) Michael Durham; 5) IGI Baychem, Inc.; 6) Integrated Labs; 7) Atlantis International Commodities, Inc.; 8) Oxid, Inc.; 9) R.D.A. International, Inc.; 10) Vista Chemical; 11) Phoencian Enterprises, Inc.; 12) Maxwell House Coffee Company; 13) Shippers International, Inc.; 14) CXI, Inc.; 15) Ultra Warehouse, Inc.; 16) Citation Corporation; 17) Fritz Companies, Inc.; 18) Grand Lockwood Partners Limited Partnership; and 19) Integrated Furniture and Equipment. Three of these named Defendants, Phoencian Enterprises, Inc., Shippers International, Inc., and CXI, Inc. have not made an appearance in this case, and any claim they may have had to the interpled insurance proceeds will not be considered. On October 4, 1994, October 19, 1994, February 6, 1995, and August 7, 1995, respectively, Custom Form

Transportation Systems, Simpson Paper Company, H. Muelstein & Co., Inc., and Enterplast, Inc. intervened in this case, claiming an interest in the interpled funds based on their respective losses of property which had been stored in the Lockwood warehouse. On November 13, 1995, Defendant Integrated Laboratory Furniture & Equipment, improperly named as two separate Defendants, Integrated Labs and Integrated Furniture & Equipment, informed the Master that it was withdrawing its claim of $30,000 to the interpled funds. A letter confirming that withdrawal followed in which Integrated Laboratory Furniture & Equipment sought to be dismissed from this case. See Exhibit "A", attached to this Report and Recommendation.

IV. THE POLICY

The Marine Indemnity policy, which was issued to Lockwood Warehouse and Storage as the Insured, provides coverage for:

> (A) Personal property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal property of others which is directly connected with the Insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to the loss to insure.
>
> (C) Real property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the Insured.

Exhibit "A" at 1, attached to Complaint for Interpleader. In addition, the policy provides coverage for debris removal in a separate debris removal clause:

> This policy is extended, subject otherwise to its full terms, conditions and limitations, to cover the Insured's expenses incurred in the removal of all debris of the property insured

> hereunder, at the premises where the loss occurs, which may be occasioned by loss or damage directly caused by any of the perils insured against in this policy, but excluding any additional or unusual expenses caused by or resulting from compliance with regulations of any governmental or environmental agency.

Exhibit "A" at 6, attached to Complaint for Interpleader.

The policy specifically excludes from coverage certain types of damages including, "delay, loss of market, loss of use; interruption of business, except as provided elsewhere herein, or UNLESS endorsed hereon." Exhibit "A" at 2, attached to Complaint for Interpleader. The basis for calculating losses or payments under the policy is the "actual cash value" of the property lost, with a deductible of $5000 for each claim made. Exhibit "A" at 4, 5, attached to Complaint for Interpleader. Coverage under the policy is excess to any other available insurance:

> Other Insurance: If at the time of loss, or damage, there is available to a named or unnamed insured or any other interested party any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance over such other insurance.

Exhibit "A" at 10, attached to Complaint for Interpleader.

V. FINDINGS OF FACT

After reviewing all the evidence submitted by the parties and considering the evidence received at the evidentiary hearing on November 13, 1995, the Master makes the following findings of fact.

1. Grand Lockwood Partners Limited Partnership owned the warehouse at 600 Lockwood, Houston, Texas, referred to herein as the "Lockwood warehouse." Affidavit of Martin C. Leibowitz, attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

theater and, after the court ruled that Frontier had been negligent in maintaining that portion of the theater, it held Frontier liable for damages to the tenant's property in the lower portion of the theater. Enterplast confuses responsibility for the *premises* with responsibility for *property stored on the premises*. Contrary to Enterplast's argument, *Frontier Theaters* only relates to a lessor's duty with regard to the portion of the leased premises it retained. If a lessor does not fulfill its duty of care with respect to the premises it controls and thereby causes damage to the lessee's property, regardless of whether the property is stored on the retained premises or unretained premises, the lessor may be held liable for the property damage. But a lessor's liability for damaged property stored on the premises arises only out of its responsibility to maintain the lessor's retained part of the premises with due care; it does not ensue from a responsibility to maintain with due care the property stored by others inside the premises. Only a bailee, not a lessor, assumes this latter responsibility.

Finally, Muehlstein's and Enterplast's argument that Lockwood was responsible for their property is barred by the exculpatory clause contained in the master lease and incorporated into the sublease agreement between Lockwood and Ultra, as well as between Lockwood and Shippers. The exculpatory clause provides that the lessor is not liable for any damage to the lessee's property, to the extent that the property damage is or could have been insured. Under Texas law, exculpatory clauses will ordinarily be enforced, if they are between private persons who bargain from positions of equal strength. *Crowell v. Housing Authority,* 495 S.W.2d 887, 889 (Tex. 1973). The parties do not contend that the exculpatory clause is void as a matter of public policy; instead, they contend that, although the clause may apply to Ultra and Shippers, the clause does not apply to them, as bailors of Ultra and Shippers. This claim is unavailing. If Lockwood, pursuant to the exculpatory clause, waived its liability for damage to the property of Ultra and Shippers, Lockwood cannot then be said to be responsible for the goods that they, as bailees, stored on behalf of others, including Muehlstein and Enterplast.

2. *Priority to the interpleaded funds.* In its initial brief, Enterplast does not contest the district court's denial of recovery to Enterplast on the ground that it was fully compensated for its losses and should therefore receive last priority to the interpleaded funds. As a result, Enterplast abandons its right to raise this issue on appeal. *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1255 (5th Cir. 1990). Muehlstein, on the other hand, continues to maintain that it was not fully compensated for the losses it suffered with respect to the stored goods that were destroyed by the warehouse fire, and that, consequently, it suffered a loss which the Marine Indemnity policy should compensate. The Marine Indemnity policy covers only the value of lost property. Muehlstein's policy with Phoenix Assurance, on the other hand, covers net sales value. Muehlstein presented evidence that Phoenix Assurance paid Muehlstein the $750,000 limits under the policy for "losses to Muehlstein's inventory based on net sales value."

Muehlstein contends, first, that the entire $750,000 it recovered under the Phoenix Assurance policy covered only its lost profits and did not cover the value of the stored goods. In the alternative, Muehlstein maintains that, if net sales loss includes a component of both lost profits and the value of its stored goods, then, because Muehlstein only recovered 69.6% of its claim from Phoenix for net sales loss, the court should have allocated this percentage to each of the components of Muehlstein's claim. Thus, Muehlstein argues that the trial court should have found that Muehlstein did not recover 30.4% of the actual value of its stored goods, or $174,662.60.[3]

Muehlstein, as a claimant to the interpleaded funds, had the burden of establishing by the preponderance of the evidence that

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[3] Muehlstein erroneously uses the figure of $574,546.63 as the amount of its inventory losses in arriving at the final uninsured loss figure of $174,662.60 ($574,546.63 × 30.4%). The special master, however, found that the amount of inventory losses was $547,546.63. Accordingly, if only 69.6% of Muehlstein's inventory costs were paid by other insurance, Muehlstein is left with an uninsured loss of $166,454.18 ($547,546.63 × 30.4%), not $174,662.60.

is was entitled to recover. After reviewing the record and considering the arguments of the parties, we find that it was not clearly erroneous for the special master to have found that Muehlstein was fully compensated for the value of its lost goods. Moreover, in light of the fact that the claims exceeded the amount of the interpleaded funds, it was not an abuse of discretion to give those who were not fully compensated first priority to the funds.

B. Grand Lockwood's Right to Recover

Kraft, Maxwell, and Vista Chemical (referred to collectively as "Kraft") object to the district court's award of $158,430.76 to Grand Lockwood, for the costs Grand Lockwood incurred in removing debris from the warehouse and cleaning up the warehouse property site after the fire. Grand Lockwood contends that Lockwood terminated its lease with Grand Lockwood and refused to clean up the warehouse site and remove debris from the premises, as it was obligated to do under the lease.

The Marine Indemnity policy contained two provisions governing debris removal and cleanup expenses. Section 13 provided:

> This policy is extended, subject otherwise to its full terms, conditions and limitations, to cover the Insured's expenses incurred in the removal of all debris of the property insured hereunder, at the premises where the loss occurs, which may be occasioned by loss or damage directly caused by any of the perils insured against in this policy . . . .

The "Debris Removal and Cost of Clean Up Extension" ("debris removal extension") provided:

> [I]n the event of direct physical loss or damage to the property insured hereunder, this Policy ... also insures, within the sum insured
>
> (a) expenses reasonably incurred in removal of debris of the property insured hereunder destroyed or damaged from the premises of the Assured; and/or

> (b) cost of clean up, at the premises of the Assured, made necessary as a result of such direct physical loss or damage . . . .

The special master found that, after the fire, Grand Lockwood spent in excess of $384,000 to remove debris and clean up the warehouse premises. Taking into consideration the $5,000 deductible under the Marine Indemnity policy, the magistrate judge then concluded that Grand Lockwood incurred damages of $379,000 that were covered by the Marine Indemnity Policy. The district court, in adopting these findings, granted Grand Lockwood a pro rata portion of the interpleaded funds, thereby diminishing the pool of interpleaded funds available to the other parties with claims.

On appeal Kraft contests the court's disbursement of interpleaded funds to Grand Lockwood on the following grounds: (1) the Marine policy does not provide coverage to Grand Lockwood; (2) claims for damaged property should receive first priority; (3) Lockwood did not present evidence that it established the condition precedent under the Marine policy, which requires that Lockwood give notice of its intent to claim recovery for debris removal or clean-up costs; and (4) Grand Lockwood failed to offer evidence that the debris removal expenses it incurred were related to the removal of property insured under the policy.

Insurance policies are no exception to the rule that one for whose benefit a contract is made may enforce the contract. However, under Texas law, a presumption exists that parties intended to contract only for themselves. *Talman Home Fed. Sav. & Loan Assoc. of Ill. v. American Bankers Ins.*, 924 F.2d 1347,1351 (5th Cir. 1991). Because Grand Lockwood is not a party to the Marine Indemnity insurance contract, "it follows that [the Marine Indemnity insurance] contract will not be construed as having been made for the benefit of [Grand Lockwood] unless it clearly appears that this was the intention of the contracting parties." *Id.; see also Resolution Trust Corp. v. Kemp*, 951 F.2d

657, 662 (5th Cir. 1992). "If there is any doubt concerning the intent in this regard as it appears from the contract itself, such doubt should be construed against such intent." *Talman*, 924 F.2d at 1351 (quoting *Republic Nat'l Bank*, 427 S.W.2d 76, 80 (Tex. Civ. App. — Dallas 1968, writ ref'd n.r.e.)).

The first provision of the Marine Indemnity policy concerning debris removal costs explicitly states that the policy covers the "Insured's expenses" for debris removal. The policy also expressly states that Lockwood is the "Insured." The second provision relating to debris removal, which is contained in the debris removal extension, does not state who can claim debris removal costs. While the debris removal extension does not explicitly exclude coverage to a third party, it also does not explicitly provide coverage to a third party. Nor do any other portions of the insurance contract demonstrate that Grand Lockwood was intended to be a beneficiary under the debris removal and clean-up cost provisions. In contrast, the property coverage provisions of the contract, by referring to the property of "others," specifically provide that certain third parties storing property in the Lockwood warehouse were intended beneficiaries under the policy.

Moreover, the debris removal extension contains a requirement that the "Assured shall give notice to the Underwriters of intent to claim for cost removal of debris or cost of clean up . . . ." In effectuating the intent of the parties to a contract, "[i]t is the duty of the Court to construe the contract as an entire instrument, and to consider each part with every other part so that the effect and meaning of one part on any other part may be determined." *Steeger v. Beard Drilling, Inc.*, 371 S.W.2d 684, 688 (Tex. 1963); *see also Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, 76 F.3d 89, 91 (5th Cir. 1996) (Texas law requires that the court read all provisions of a contract together in order to give each prevision its intended effect). The notice requirement in the debris removal extension is rendered meaningless, unless the parties intended that only Lockwood could claim expenses for debris removal and clean-up costs. In order to give effect to the

notice requirement, which requires that Lockwood provide notice to Marine Indemnity of its intent to claim debris removal and clean-up costs, we find that Grand Lockwood was not entitled to make a claim for these costs. In summary, Grand Lockwood has failed to meet its burden of proof in establishing that it was an intended beneficiary under the debris removal and clean up provisions of the Marine Indemnity contract, and, for this reason, we reverse the judgment of the district court.

M. Conclusion

In light of the foregoing, we affirm the district court's judgment that Muehlstein and Enterplast are not entitled to recover under the Marine Indemnity policy. We reverse the district court's judgment awarding interpleaded funds to Grand Lockwood and remand for a recalculation and redistribution of the interpleaded funds.

APPENDIX B

IN THE

United States Court of Appeals For the Fifth Circuit

No. 96-20441

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,

Plaintiff,

V.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC;

Defendants — Appellants

V.

KRAFT GENERAL FOODS INC;
GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP; THIRD COAST PACKAGING;
IGI BAYCHEM, INC;
OXID, INC; R D A INTERNATIONAL, INC;
VISTA CHEMICAL

Defendants — Appellees

V.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants — Appellants.

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before POLITZ and DEMOSS, Circuit Judges, and JUSTICE,* District Judge.

PER CURIAM:

* District Judge of the Eastern District of Texas, sitting by designation.

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX C

IN THE

United States Court of Appeals For the Fifth Circuit

No. 96-20441

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,

Plaintiff,

V.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC;

Defendants — Appellants

V.

KRAFT GENERAL FOODS INC;
GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP; THIRD COAST PACKAGING;
IGI BAYCHEM, INC;
OXID, INC; R D A INTERNATIONAL, INC;
VISTA CHEMICAL

Defendants — Appellees

V.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants — Appellants.

Appeals from the United States District Court for the Southern District of Texas, Houston

Before POLITZ and DEMOSS, Circuit Judges, and JUSTICE,* District Judge.

ORDER:

* District Judge of the Eastern District of Texas, sitting by designation.

IT IS ORDERED that the motion of appellee, Grand Lockwood Partners Limited Partnership, for clarification of the opinion filed June 4, 1997, is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA, Plaintiff, vs. LOCKWOOD WAREHOUSE & STORAGE ET AL., Defendants.	CIVIL ACTION NO. H-94-2430

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion and Order of this day adopting United States Magistrate Judge Frances H. Stacy's Special Master's Report and Recommendation (Instrument #153) and Errata Sheet Supplementing the Special Master's Report and Recommendation (Instrument #170), the Court hereby

ORDERS that the interpled funds in the Registry of the Court shall be distributed pro rata as follows:

(1) Kraft General Foods, Inc.: 32.61% of the interpled funds plus interest;[1]

(2) IGI Baychem: 3.11% of the interpled funds plus interest;[2]

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[1] Kraft's pro rata share of the interpled funds is calculated as follows: $995,000 (Kraft's covered claim) / $3,050,947.95 (total covered claims) = 32.61%.

[2] IGI Baychem's pro rata share of the interpled funds is calculated as follows: $95,000 (IGI Baychem's covered claim) / $3,050,947.95 (total covered claims) = 3.11%.

(3) Michael L. Durham, P.C.: 7.18% of the interpled funds plus interest;[3]

(4) Vista Chemical: 39.26% of the interpled funds plus interest;[4]

(5) Third Coast Packaging: 2.03% of the interpled funds plus interest;[5]

(6) Oxid, Inc.: 0.89% of the interpled funds plus interest;[6]

(7) R.D.A. Trading, Inc.: 2.50% of the interpled funds plus interest;[7] and

(8) Grand Lockwood Partners Limited Partnership: 12.42% of the interpled funds plus interest.[8]

The Court further

ORDERS that all parties shall bear their own costs of court; and

ORDERS that all relief not granted herein is **DENIED**.

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[3] Michael L. Durham, P.C.'s pro rata share of the interpled funds is calculated as follows: $219,000 (Michael L. Durham, P.C.'s covered claim) / $3,050,947.95 (total covered claims) = 7.18%.

[4] Vista Chemical's pro rata share of the interpled funds is calculated as follows: $1,197,796.40 (Vista Chemical's covered claim) / $3,050,947.95 (total covered claims) = 39.26%.

[5] Third Coast Packaging's pro rata share of the interpled funds is calculated as follows: $61,750 (Third Coast Packing's covered claim) / $3,050,947.95 (total covered claims) = 2.02%.

[6] Oxid, Inc.'s pro rata share of the interpled funds is calculated as follows: $27,200 (Oxid, Inc.'s covered claim) / $3,050,947.95 (total covered claims) = 0.89%.

[7] R.D.A. Trading, Inc.'s pro rata share of the interpled funds is calculated as follows: $76,201.55 (R.D.A. Trading, Inc.'s covered claim) / $3,050,947.95 (total covered claims) = 2.50%.

[8] Grand Lockwood Partners Limited Partnership's pro rata share of the interpled funds is calculated as follows: $379,000 (Grand Lockwood Partners Limited Partnership's covered claim) / $3,050,947.95 (total covered claims) = 12.42%.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 28th of February, 1996.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,	§	
Plaintiff,	§	
vs.	§	CIVIL ACTION
	§	NO. H-94-2430
LOCKWOOD WAREHOUSE & STORAGE ET AL.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is United States Magistrate Judge Frances H. Stacy's Special Master's Report and Recommendation (Instrument #153) which was signed on December 29, 1995. Pursuant to several of the parties' unopposed request, the Court designated Magistrate Stacy as a Special Master on September 30, 1995 to consider the issues of the various claimants' insurable interests, calculation of damages, and priority of claims. *See* Instrument #84. Also pending before the Court is Ultra Warehouse, Inc.'s ("Ultra") Motion to Amend the Report and Recommendation of the Special Master (Instrument #156), H. Muehlstein & Company, Inc.'s ("Muehlstein") Motion to Amend the Report and Recommendation of the Special Master (Instrument #159), Grand Lockwood Partners Limited Partnership's ("Lockwood Partners") Motion to Amend the Special Master's Report and Recommendation (Instrument #164), Lockwood Partners' Motion to Reform the Recommendation (Instrument #165), and various parties' objections to the Report and Recommendation. In response to the various filings, Magis-

2. Grand Lockwood Partners Limited Partnership leased the Lockwood warehouse to Lockwood Warehouse & Storage pursuant to a written lease agreement dated, January 1, 1993. Exhibit "A" attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

3. Lockwood Warehouse & Storage ("Lockwood") was in the business of operating a warehouse and storing the property of others. Exhibit "A" at 3, attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

4. A fire destroyed the Lockwood warehouse and all its contents on November 8, 1993. Affidavit of Martin C. Leibowitz, attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

5. Reclaimed industrial canning equipment, valued at $66,750, which was being stored by Third Coast Packaging, was destroyed in the Lockwood warehouse fire. Affidavit of David Richards & Lockwood Warehouse and Storage invoices, both attached to Third Coast Packaging's Brief.

6. Third Coast Packaging did not have insurance that covered its losses from the Lockwood warehouse fire. Affidavit of Larry Ramsay. Third Coast Packaging's losses of $66,750 have been entirely uncompensated.

7. Swedish pine lumber, valued at $33,322.60, including transportation and storage costs, which was being stored in the warehouse by The Fritz Companies, Inc. for Snavley Forest Products, Inc., was destroyed in the Lockwood warehouse fire. Affidavit of Berlin Edward, attached to The Fritz Companies/Snavely Forest Products' Brief.

8. Snavley Forest Products, Inc. had its own insurance with Northbrook Property and Casualty Company on the lumber it had stored in the Lockwood warehouse. Affidavit of Ed Arguello. That insurer paid Snavley $29,000 for its loss, leaving Snavley

with an uncompensated loss of $4,322.60. Affidavit of Ed Arguello.

9. Medical supplies, which were being stored in the Lockwood warehouse by Michael L. Durham, P.C., were destroyed in the Lockwood warehouse fire. Deposition of Michael Durham, at 13-14, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

10. Michael L. Durham, P.C.'s medical supplies were purchased by Michael L. Durham, P.C. from a bankruptcy sale in October 1991 for $187,000. Deposition of Michael Durham, at 17, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

11. At the time of the fire, Michael L. Durham, P.C. had a written contract for the sale of the medical supplies with Marshall Davis d/b/a Maheda. Under that contract, Marshall Davis d/b/a Maheda was to pay Michael L. Durham, P.C. $450,000 in cash. Deposition of Michael L. Durham at 26 & Agreement for Sale and Purchase of Medical Supplies, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

12. Michael L. Durham, P.C. took a $224,000 tax loss on the medical supplies in 1993. Deposition of Michael L. Durham at 47-48, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

13. Lockwood represented to Michael L. Durham, P.C. that it had insurance on the contents of the warehouse. Deposition of Michael Durham at 39, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

14. Michael L. Durham, P.C. did not have insurance of its own on the medical supplies that were destroyed in the Lockwood warehouse fire. Deposition of Michael L. Durham at 39, attached as Exhibit "A" to the Affidavit of Paul J. Coselli. Michael L. Durham, P.C. is thus uncompensated to the full extent of its $450,000 property loss claim.

15. Atactic polypropylene, a plastic polymer product, which had a purchase or manufacturing cost of $493,873.58, and which was being stored in the Lockwood warehouse by IGI Baychem,

Inc., was destroyed in the Lockwood warehouse fire. Deposition of Larry A. Elrod at 16-18, and Deposition of Gene G. McNally at 31-35, attached as Exhibits "D" and "E", respectively, to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

16. IGI Baychem had a written agreement with Shaft Warehouse and Storage, the predecessor in interest of Lockwood Warehouse and Storage, for the storage, packaging and shipping of its goods. Exhibit "A" attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

17. In the agreement between IGI Baychem and Shaft, Shaft was given "full charge and responsibility" for the storage, packaging and shipping of IGI Baychem's goods. Exhibit "A" at 7.1, attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds. Additionally, in the agreement, Shaft agreed to "maintain all hazard insurance on the product stored with Shaft." Exhibit "A" at 7.2, attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

18. IGI Baychem had property damage insurance with American Home Assurance Company which covered some of IGI Baychem's loss. Affidavit of Gene G. McNally & attached proof of loss and subrogation receipt. American Home Assurance paid IGI Baychem $393,873.58 for the loss of its property in the Lockwood warehouse fire. Affidavit of Gene G. McNally & attached proof of loss and subrogation receipt. As IGI Baychem was not paid by American Home Assurance for $100,000 of its loss, the amount representing IGI Baychem's deductible under the American Home policy, IGI Baychem remains uncompensated by $100,000.

19. Drums and palletized cases of motor oil, which had a cost of $72,451.03, and which were being stored in the Lockwood warehouse by Atlantis International Commodities, Inc., were destroyed in the warehouse fire. Affidavit of Maria Carubba; Valuation Addendums, Exhibits 2 & 4 attached to Affidavit of Maria Carubba.

20. Atlantis was a named loss payee on the Marine Indemnity policy. Exhibit 1 to Affidavit of Maria Carubba.

21. Atlantis had insurance of its own to cover the losses it sustained in the Lockwood warehouse fire. Stipulation of Robert C. Oliver, attorney for Atlantis International. Thus, Atlantis has been entirely compensated for its losses of $72,451.03.

22. Chemicals, including Chemex 2139, Terol 11 and Terol 256, Pentaerythritol, Terol 170, Terol 200, OX-82, and Terol 174/256, valued at $32,200, which were being stored in the Lockwood warehouse by Oxid, Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Mac L. Medlen, attached to Brief.

23. Oxid had insurance with Reliance Insurance Company with policy limits $15,000,000 and a deductible of $100,000. Supplemental Affidavit of Mac L. Medlen and attached policy. As Oxid's claim of $32,200 is less than its $100,000 insurance deductible and as Oxid does not have other insurance that would cover this loss, it is therefore uncompensated the full amount of its $32,200 claim.

24. Atactic polypropylene, valued at $81,201.55, which was being stored in the Lockwood warehouse by R.D.A. Trading, Inc., was destroyed in the Lockwood warehouse fire. Affidavit of Michael Lowenthal, attached as Exhibit "A" to Brief of R.D.A. Trading, Inc. in support of Claim for Portion of Insurance Proceeds.

25. R.D.A. Trading, Inc. had no insurance of its own to cover the loss of its property which was stored in the Lockwood warehouse. Affidavit of Michael Lowenthal Regarding Insurance

Coverage. Thus, R.D.A. Trading is uncompensated to the full extent of its claim, $81,201.55.

26. Alumina and alumina compound byproducts, valued at $1,516,396 at the time of the fire, which were being stored in the Lockwood warehouse by Vista Chemical, were destroyed in the Lockwood warehouse fire. Affidavit of Glen Telge; Testimony of Fenton at evidentiary hearing. The current fair market value of the lost alumina and alumina byproducts is approximately $1,800,000. Affidavit of Glen Telge; Testimony of Fenton at evidentiary hearing.

27. Shaft Warehouse & Storage, the predecessor in interest to Lockwood Warehouse & Storage, orally agreed to maintain insurance on any loss or damage to Vista Chemical's property stored at the Lockwood warehouse. Affidavit of Glen Telge.

28. Vista Chemical had some insurance of its own on the property that was lost in the Lockwood warehouse fire. Affidavit of David Marshall. Vista Chemical recovered $309,837.60 from its insurers, leaving an uncompensated loss of $1,202,796.40. Affidavit of David Marshall.

29. Coffee, valued at $6,994,355, which was being stored in the Lockwood warehouse by Kraft General Foods, Inc., parent company of Maxwell House Coffee Company, was destroyed in the Lockwood warehouse fire. Final Statement of Loss, attached to Exhibit "A" of Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

30. Kraft General Foods sustained business interruption damages of $786,117, extra expenses of $76,804, and loss of machinery and equipment valued at $406,889 as a result of the Lockwood warehouse fire. Final Statement of Loss, attached to Exhibit "A" of Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

31. Maxwell House Coffee Company, a division of Kraft General Foods, Inc., had written agreements with Shaft Warehouse & Storage, the predecessor in interest to Lockwood Ware-

house & Storage, for the storage, blending and packaging of coffee. Exhibits "A" & "B" to Brief; Deposition of Roger E. Stuart at 8, Exhibit "H", attached to Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

32. In the agreement between Maxwell House Coffee Company and Shaft Warehouse & Storage dated April 10, 1990, Shaft agreed to provide Maxwell House with a "certificate of insurance as verification" of warehouseman's liability coverage. Exhibit "A" attached to Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

33. In the agreement between Maxwell House Coffee Company and Shaft Warehouse & Storage dated April 25, 1991, Shaft agreed to provide Maxwell House with "certificates of insurance from Shaft's insurer" evidencing "property damage liability limits of not less than $1,000,000 per occurrence." Exhibit "B" attached to Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

34. Kraft General Foods had other insurance which covered all but $1,000,000 of its losses in the fire. Affidavit of Don W. Davidson; Affidavit of David E. Heiber. The $1,000,000 which was not covered by other insurance represents Kraft's deductible under its other insurance. Deposition of Rajat Bahri at 16, Exhibit "G" to Brief. To the extent Kraft was not paid by its own insurance companies for $1,000,000 of its loss, Kraft is uncompensated in the amount of $1,000,000.

35. Office and warehouse equipment, valued at $8797.10, and belonging to Ultra Warehouse, Inc., was destroyed in the Lockwood warehouse fire. Affidavit of Ruth L. Heater at 2-3, attached as Exhibit "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

36. As a result of the fire, Ultra Warehouse lost $15,811.73 in lost rent, and was forced to pay higher rent for warehouse space in another warehouse. Affidavit of Ruth L. Heater at 2-3, attached

as Exhibit "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

37. Ultra Warehouse, Inc. entered into a written sublease agreement with Lockwood Warehouse & Storage dated June 15, 1993. There was no provision whatsoever for insurance in that agreement. Exhibit "A" to Affidavit of Del Heater. Ultra, in turn, entered into written warehouse contracts with Simpson Paper and H. Muelstein & Co., Inc. for the storage of their goods in the Lockwood warehouse. Exhibits "B" and "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

38. Ultra Warehouse did not have insurance on the goods it stored in the Lockwood warehouse or the equipment that was in the Lockwood warehouse at the time of the fire. Supplementary Affidavit of Del Heater. Thus, Ultra is uncompensated in the amount of the full extent of its loss.

39. Dishes and dinnerware, which were being stored in the Lockwood warehouse by The Fritz Companies for Citation Sales & Marketing, Inc., were destroyed in the Lockwood warehouse fire. Exhibit "N" to Brief; Deposition of Patricia Upchurch.

40. The replacement value of the dishes and dinnerware destroyed by the fire was $203,532.29, Exhibit "N", attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

41. Citation Sales & Marketing had insurance with Home Indemnity on the goods it stored in the Lockwood warehouse. Its deductible under that insurance was $1000. Exhibit "N," attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds; Exhibit "A" to Citation Sales & Marketing's Supplemental Brief Regarding Extent of Uninsured Loss. Thus, Citation Sales & Marketing is uncompensated in the amount of $1,000.

42. Paper, valued at $310,072.15, which was being stored in the Lockwood warehouse by Custom Form Transportation Systems, was destroyed in the Lockwood warehouse fire. Exhibit "J" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

43. As a result of the fire, Custom Form Transportation suffered equipment losses of $17,430, and business interruption losses of $96,981.59. Exhibit "K" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

44. Custom Form Transportation Systems entered into a written lease agreement with Shaft Warehouse & Storage dated April 2, 1991. Under that lease, Custom Form agreed to "keep and maintain, with insurance carriers and in the form acceptable to [Shaft], comprehensive general liability insurance applying to the activities of [Custom Form], and in connection with, the Premises, with limits of liability not less than $ [1] hereinabove for injury to or death of one or more persons or property damage." Exhibit "F" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

45. Custom Form Transportation Systems entered into a written sublease agreement with Lockwood Warehouse & Storage dated June 15, 1993. There was no provision for insurance in that agreement. Exhibit "F" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

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[1] The amount was left blank.

46. Custom Form had its own insurance with Fidelity & Casualty of New York on the paper and equipment it stored in the Lockwood warehouse. Affidavit of James D. Vaughn & attachments. It was paid the limits of its property damage liability policy, $300,000, for the paper that was destroyed in the fire. Affidavit of James D. Vaughn & attachments. Additionally, Custom Form was paid $16,430 for the loss of its equipment. Affidavit of James D. Vaughn & attachments; Exhibits "I" and "J", attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds. Custom Form was not paid $1000 of its claimed equipment loss, that amount representing the deductible for equipment losses under the policy. Affidavit of James D. Vaughn & attachments. Additionally, Custom Form was not paid $10,072.15 of its property loss claim, that amount representing its damages in excess of the $300,000 policy limits. Affidavit of James D. Vaughn & attachments. Finally, Custom Form was not paid $96,981.59 for its business interruption losses, such damages not being covered by the Fidelity & Casualty policy. Affidavit of James D. Vaughn & attachments. In total, Custom Form was uncompensated in the amount of $108,053.74.

47. Paper, valued at $5,359,844 (inclusive of storage warehousing expenses, overtime charges, and bill of lading charges), which was being stored in the Lockwood warehouse by Simpson Paper Company, was destroyed in the Lockwood warehouse fire. Affidavit of John Ronan.

48. Simpson Paper Company had a written storage agreement with Ultra Warehouse, Inc., for the storage of its paper in the Lockwood warehouse. That agreement provided that "Goods are not insured by warehouseman [Ultra] against loss or damage however caused." Exhibit "B" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages; Affidavit of Dennis Hollander.

49. Simpson Paper was paid $5,251,054 by its own insurance company, Arkwright Mutual Insurance Company, for its property losses. Affidavit of John Ronan. The remaining $108,790 is the amount for which Simpson was not compensated.

50. Packaged plastic materials, with a cost of $347,346.63, which were being stored in the Lockwood warehouse by H. Muelstein & Co., Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Martin Zielonka. The net sales value of the lost packaged plastic materials was $1,078,233. Affidavit of Gary Markelon, attached to H. Muelstein & Company's Brief on the Issue of Priority of Claims.

51. H. Muelstein & Co., Inc. had a written storage agreement with Ultra Warehouse, Inc., for the storage of its plastic products in the Lockwood warehouse. That agreement provided that "Goods are not insured by warehouseman [Ultra] against loss or damage however caused." Exhibit "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

52. H. Muelstein was paid $750,000 by its own insurance company, Phoenix Assurance Company of New York, the policy limits of the insurance less a $1000 deductible, for Muelstein's losses in the fire. Affidavit of Gary Markelon, attached to H. Muelstein & Company's Brief on the Issue of Priority of Claims. Given that H. Muelstein was paid in excess of the cost or cash value of its property by its own insurer, H. Muelstein has been fully compensated for the actual cash value of the property it lost.

53. Rubber products, with a fair market value of $339,445, which were being stored in the Lockwood warehouse by Enterplast, Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Frederick Tedori, Jr.

54. Lance Cowan d/b/a Shippers International had a written sublease agreement with Lockwood dated August 1, 1993. Exhibit "E" to Enterplast, Inc.'s Supplemental Brief in Support of Recovery of Insurance Proceeds under Marine Indemnity Policy

Number Y-ITF941467. Enterplast, Inc. had an oral storage agreement with Lance Cowan d/b/a Shippers, International for the storage of its rubber products in the Lockwood warehouse. Affidavit of Frederick Tedori, Jr.

55. Enterplast. Inc. had its own insurance on the goods it stored in the Lockwood warehouse with Intercargo Insurance Company. Affidavit of Sheila Skipper. Enterplast submitted a claim of $370,502 to Intercargo for the loss of its goods in the fire. Affidavit of Sheila Skipper. Intercargo paid Enterplast $347,911.49 for the losses it sustained in the Lockwood warehouse fire. Affidavit of Sheila Skipper. To the extent Enterplast was paid by Intercargo in excess of the fair market value of the goods Enterplast lost, Enterplast has been fully compensated for the actual cash value of its property.

56. After the fire that destroyed the Lockwood warehouse, Grand Lockwood Partners Limited Partnership expended in excess of $384,000 to remove debris and clean up the site of the Lockwood warehouse fire. Affidavit of Martin C. Leibowitz, attached as Exhibit "A" to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

57. Grand Lockwood Partners Limited Partnership did not have insurance which covered the costs it incurred in removing debris and cleaning up the site of the Lockwood warehouse fire. Affidavit of Stephen Lawrence.

58. Marine Indemnity paid Lockwood $56,390, for the loss of Lockwood's betterments and improvements on the Lockwood warehouse. That amount represented the lost value of the betterments and improvements less the $5,000 deductible under the policy.

59. For all those who stored property in the warehouse, Lockwood provided fire protection, building security, maintenance, and housekeeping. Lockwood also provided tenants with access to the warehouse when repairs and maintenance were necessary. Affidavit of John Ronan at 3-4; Affidavit of Del Heater at 2-3.

60. Lockwood had an office in the warehouse, over which it had complete control and where one of its representatives worked during normal business hours. Affidavit of John Ronan at 3-4.

61. Lockwood maintained control over all common areas in the warehouse, including the hallways and loading dock. Affidavit of John Ronan at 3-4.

62. All repairs, maintenance or housekeeping matters related to the warehouse were referred to Lockwood for action. Affidavit of John Ronan at 3-4.

63. Lockwood provided and paid for all utilities at the warehouse. Affidavit of Del Heater at 2.

64. Lockwood's employees had access to all areas in the warehouse and could enter areas in the warehouse which were leased to others in order to make repairs or do maintenance. Affidavit of Del Heater at 2-3.

65. Lockwood conducted periodic general inspections of the entire warehouse. Affidavit of Del Heater at 4.

VI. CONCLUSIONS OF LAW ON INSURABLE INTEREST

With respect to each Defendant's insurable interest under the Marine Indemnity policy, the central issues for resolution are whether each Defendant's claim falls within the coverage provided by the policy and whether such claim is excluded or limited by any other provision of the policy. In that regard, the Master, using the foregoing findings of fact, makes the following conclusions of law on the insurable interest issue.

An interpleader action, available at common law and by statute, 28 U.S.C. § 1335, allows a party who concedes liability to have conflicting claims against it resolved in one forum. *Illinois Employers Ins. v. Mihalcik*, 801 F.2d 949, 951 n.3 (7th Cir. 1986), *cert. denied.*, 479 U.S. 1087 (1987); *Financial Guaranty Ins. Co. v. Fayetteville*, 749 F. Supp. 934, 943 (W.D. Ark. 1990),

aff'd, 943 F.2d 925 (8th. Cir. 1991). It is a mechanism used when two or more persons claim an interest in a definite and identifiable fund and when the claims to the fund risk exceeding the total value of the fund. *In re Joint Eastern & Southern Districts Asbestos Litigation,* 120 B.R. 648, 657 (E.D. N.Y. 1990). The prerequisites to an interpleader action include, the deposit of money, property or a bond with the court, *Gardes Directional Drilling v. U.S. Turnkey Exploration, Inc.,* 815 F. Supp. 956, 961 (W.D. La. 1993), and the existence of a single, identifiable fund to which there are conflicting claims of entitlement. *Wausau Insurance Companies v. Gifford,* 954 F.2d 1098, 1100 (5th Cir. 1992). Conflicting claims to insurance proceeds provide an ideal situation for an interpleader action. *See e.g. Daniels v. Equitable Life Assurance Society of the United States,* 35 F.3d 210 (5th Cir. 1994).

Interpleader, whether instituted under common law or by statute, is a proceeding in equity. *Great American Ins. Co. v. Spraycraft, Inc.,* 844 F. Supp. 1188, 1191 (S.D. Ohio 1994); *Truck-a-Tune, Inc. v. Re,* 856 F. Supp. 77, 80 (D. Conn. 1993), *aff'd, sanctions disallowed,* 23 F. 60 (2nd Cir. 1994); *In re Continental Airlines Corp.,* 60 B.R. 472, 476 (S.D. Tex. 1986). Although equitable in nature, a determination on the proper distribution of interpled funds must be based on the law. *Prudential Ins. Co. v. Neal,* 768 F. Supp. 195, 200 (W.D. Tex. 1991); *Fidelity & Deposit Co. v. McKinney,* 1993 W.L. 43616 (E.D. La. 1993). When the interpled funds arise by virtue of a contract, a determination on the proper distribution of such funds must be in accord with the contract that created the fund. *Gross v. Connecticut General Life Ins. Co.,* 390 S.W.2d 388, 390 (Tex. Civ. App. — El Paso 1965, no writ). Similarly, in interpleader cases which are based on insurance proceeds, a determination on the proper distribution of such proceeds must conform with the terms of the insurance policy from which the insurance proceeds arose. *Id.* (holding "[o]rdinarily in all contracts, including those in the insurance field, the insured is entitled to recover only under and by the terms of the contract itself"). Given that this interpleader

case is based on insurance proceeds, the resolution of the issues presented in this action must be based primarily on the provisions of the insurance policy at issue and secondarily on considerations of equity.

In an interpleader action, each party claiming entitlement to the interpled funds has the burden of proof by a preponderance of the evidence to show its entitlement to the funds. *In re the Kelly Group,* 159 B.R. 472, 476 (W.D. Va. 1993); *Midland Ins. Co. v. Friedgood,* 577 F. Supp. 1407, 1411 (S.D. N.Y. 1984). If that burden is not met, that claimant is generally not entitled to any share in the interpled funds. If there is a general lack of evidence from which the court can determine the proper entitlement to the interpled funds, the court may, using equitable considerations, distribute the funds on a pro rata basis among all the claimants. *See e.g., Farmers Ins. Co., Inc. v. Personal Representative of Mitchell,* 755 F. Supp. 255 (W.D. Ark. 1989).

In the instant interpleader action, coverage under an insurance contract is at issue. The claimants dispute not only who is covered by the insurance policy, but also the proper distribution and order by which each claimant should be paid from the proceeds of the policy. With regard to each claimant's coverage under the policy, the Marine Indemnity policy provides coverage for:

> (A) Personal property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal property of others which is directly connected with the Insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to the loss to insure.
>
> (C) Real property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the Insured.

Exhibit "A" at 1, attached to Complaint for Interpleader. To be entitled to coverage under the policy for personal property destroyed in the Lockwood warehouse fire, each claimant other than Lockwood and Grand Lockwood Partners Limited Partnership must show that the property they lost was "directly connected with [Lockwood's] business while in [Lockwood's] care, custody or control." Exhibit "A" at 1, attached to Complaint for Interpleader. Those claimants must also show either that Lockwood was responsible for the property that was lost or that Lockwood agreed in writing to insure the property prior to the time the property was lost.

In interpreting the Marine Indemnity policy and the coverage provisions at issue in this case, ordinary principles of contract construction are used and the extent of coverage is "determined by the intentions of the parties as reflected by the words of the policy." *Schnabel v. Philadelphia American Life Ins. Co.,* 795 F. Supp. 816, 822 (S.D. Tex. 1992). If the policy and the coverage provisions are not ambiguous, the policy will be construed as written. *Id.* In reviewing the Marine Indemnity policy and its coverage provisions for property damage, the Master concludes that the policy is not ambiguous. The policy and its coverage provisions will therefore be construed as written, undefined and operative terms being given their ordinary and usual meaning. *Puckett v. U.S. Fire Ins. Co.,* 678 S.W.2d 936, 938 (Tex. 1984); *United States Ins. Co. v. Boyer,* 269 S.W.2d 340, 341 (Tex. 1954). Although case law may give some insight into the legal or technical definition of operative terms contained in the coverage provisions of the Marine Indemnity policy, the legal or technical definition does not control; the plain, ordinary and generally accepted meanings of the terms do. *Ramsay v. Maryland American General Ins. Co.,* 533 S.W.2d 344, 346 (Tex. 1976) ("When terms of an insurance policy are unambiguous, they are to be given their plain, ordinary, and generally accepted meaning unless the instrument itself shows that the terms have been used in a technical or different sense."); *See also Garrison v. Fielding Reinsurance, Inc.,* 765 S.W.2d 536, 538 (Tex. App. — Dallas

1989, writ denied); *Entzminger v. Provident Life & Accident Ins. Co.*, 652 S.W.2d 533 (Tex. App. — Houston [1st Dist.] 1983, no writ).

The operative terms in the property damage coverage provisions of the Marine Indemnity policy include, "care," "custody," "control," and "responsible." These terms are not defined by the policy and will therefore be given their plain and ordinary meaning. Webster's Dictionary defines these terms as follows:

> Care: charge, supervision, management; responsibility for or attention to safety and wellbeing . . .
>
> Custody: the act or duty of guarding and preserving; safekeeping: protection, care, maintenance . . .
>
> Control: To have power over; power or authority to guide or manage . . .
>
> Responsible: answerable, accountable, amenable, liable . . .

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).

As the policy coverage language refers to care, custody *or* control in the disjunctive, the claimants need only show that their property was in Lockwood's care, Lockwood's custody or Lockwood's control. They need not prove all three elements of care, custody and control. *See Wood v. Paulus*, 524 S.W.2d 749, 756 (Tex. Civ. App. — Corpus Christi 1975, writ ref'd n.r.e.); *Board of Insurance Commissioners v. Guardian Life Ins. Co.*, 180 S.W.2d 906, 908 (Tex. 1944).

A. The property of Kraft General Foods, Inc., IGI Baychem, and Atlantis, International, which was lost in the warehouse fire, was property that was "directly connected with [Lockwood's] business while in [Lockwood's] care, custody or control" and was property that Lockwood agreed in writing to insure prior to the time in which the property was lost.

Those who had an agreement with Lockwood for the storage of their property and a written agreement that Lockwood was to insure their property are covered by the property damage provisions of the Marine Indemnity policy. These claimants include Kraft General Foods, Inc., IGI Baychem, Inc., and Atlantis, International.

1. Kraft General Foods, Inc.

Kraft's submissions show that Kraft stored coffee in the Lockwood warehouse under written storage, blending and packaging agreements. Those agreements evidence the first coverage requirement, that Kraft, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody or control. Those agreements also evidence the second coverage requirement, that Lockwood agreed in writing to insure Kraft's property prior to the time Kraft sustained its loss.

2. IGI Baychem

IGI Baychem's submissions show that IGI Baychem stored atactic polypropylene, a plastic polymer product, in the Lockwood warehouse under a written storage, packaging and shipping agreement. That agreement evidences the first coverage requirement, that IGI Baychem, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody or control. That agreement also evidences the second coverage requirement, that Lockwood agreed in writing to insure IGI Baychem's property prior to the time IGI Baychem sustained its loss.

3. Atlantis International

Atlantis' submissions, including the deposition excerpts of James A. Longuet, wherein he admits that Lockwood stored Atlantis' drums and palletized cases of motor oil, evidence the first coverage requirement, that Atlantis, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody or control. The "evidence of insurance" submitted by Atlantis, wherein Atlantis was named as a loss payee on the Marine Indemnity policy, Exhibit 1 to Affidavit of Maria Carubba, establishes the second coverage requirement, that Lockwood agreed in writing to insure Atlantis' property prior to the time Atlantis sustained its loss.

B. The property of Michael L. Durham, P.C., Vista Chemical, Third Coast Packaging, The Frit Companies/ Snavley Forest Products, Inc., Oxid, Inc., and R.D.A. Trading, which was lost in the warehouse fire, was property that was "directly connected with [Lockwood's] business while in [Lockwood's] care, custody or control" and was property for which Lockwood was "responsible."

Those who had an oral agreement with Lockwood for the storage of their property in the Lockwood warehouse are covered by the property damage provisions of the Marine Indemnity policy. These claimants include Michael L. Durham, P.C., Vista Chemical, Third Coast Packaging, The Fritz Companies/Snavley Forest Products, Inc., Oxid, Inc., and R.D.A. Trading. In determining that Lockwood was "responsible" for the property of Michael L. Durham, P.C., Vista Chemical, Third Coast Packaging, The Fritz Companies/Snavley Forest Products, Inc., Oxid, Inc., and R.D.A. Trading, a distinction is drawn between leases and bailments. Correctly characterizing each claimant's relationship with Lockwood as either a lease or bailment is essential because the legal duties and responsibilities associated with a bailment are different from the legal duties and responsibilities associated with a lease. These legal duties and responsibilities, in

turn, provide evidence as to whether Lockwood was "responsible" within the meaning of the Marine Indemnity policy for the property of each claimant.

Under Texas law, a bailment is created when one person delivers personal property to another in trust for a specific purpose and the other person accepts that property with the express or implied agreement that the trust will be carried out and the property returned as directed. *Braniff Airways v. Exxon Co.*, 814 F.2d 1030, 1038 (5th Cir. 1987). In contrast, a lease is "a transfer of an interest in and possession of property for a prescribed period of time in exchange for an agreed consideration called 'rent.'" *State National Bank v. United States,* 509 F.2d 832, 835 (5th Cir. 1975).

Although most claimants in this case do not specifically identify their relationship with Lockwood as a bailment or a lease, the submissions of most claimants allow the Master to determine whether a bailment or lease was created. In *Luther Transfer & Storage, Inc. v. Walton,* 296 S.W.2d 750 (Tex. 1956), the Texas Supreme Court distinguished between a warehouseman's bailment and a lease of space in a warehouse. In *Luther Transfer,* the plaintiffs

> had rented from defendant at a rate of $20 per month a compartment or locker in the basement of defendant's warehouse. The locker was used by plaintiffs to store men's suits and other articles of merchandise. The door to the locker was equipped with a hasp and loop whereby it could be locked. Plaintiffs placed their lock on the locker and gave a key to the defendant, and themselves kept keys which would open the lock and afford entrance to the storage room or locker. When goods were taken to be stored in the locker, one of the plaintiffs or an agent of plaintiffs would accompany the goods to the storage space and help unload the merchandise to be stored. The defendant would send a truck for the goods, upon call from plaintiffs, and transport them to the storage locker. Also, when plaintiffs desired goods to be brought out of

> storage to their place of business, they would telephone defendant employees at the warehouse, who would take the key which they had, and unlock the locker, take out the desired articles, lock the door to the storage locker, and deliver the goods to plaintiffs' place of business.

Id. at 751-52. Based on those facts, the Texas Supreme Court concluded that the relationship between the parties "was not that of landlord and tenant, but was that of warehouseman and depositor." *Id.* at 753. Under the guidance of *Luther Transfer,* the Master concludes that an agreement to store personal property in a warehouse by a warehouseman such as Lockwood is a bailment, not a lease.

The duties and responsibilities under a bailment or a lease differ primarily in that a bailment creates a duty of care with respect to the bailed property and a lease creates a duty of care with respect to the leased premises. Under a bailment arrangement, the bailee has the duty to exercise ordinary care over the goods placed in its care. *Allright, Inc. v. Elledge,* 515 S.W.2d 266, 267 (Tex. 1974); *Ampco Auto Parks, Inc. v. Williams,* 517 S.W.2d 401, 403 (Tex. Civ. App. — Dallas 1974, writ ref'd n.r.e.); *West v. Slaughter,* 384 S.W.2d 185, 187 (Tex. Civ. App. — Waco 1964, writ ref'd n.r.e.). When a bailment is created between a warehouseman and a depositor, the same duty of ordinary care is imposed on the warehouseman (bailee) for the goods placed in his care by the depositor (bailor). *Farmers Gin Co. v. Texas Electric Ry. Co.,* 232 S.W.2d 890, 892 (Tex. Civ. App. — Waco 1950, writ ref'd n.r.e.); *Dallas v. Milum,* 200 S.W.2d 833, 836 (Tex. Civ. App. — Dallas 1947, writ ref'd n.r.e.). In contrast, under a lease arrangement, the lessor has the duty to use ordinary care in maintaining the areas under its control. *Brown. v. Frontier Theatres, Inc.,* 369 S.W.2d 299, 302 (Tex. 1963); *Jones v. Houston Aristocrat Apartments, Ltd.,* 572 S.W.2d 1 (Tex. Civ. App. — Houston [1st Dist] 1978, writ ref'd n.r.e.). It also has the duty to exercise ordinary care over the premises under its control for the safety of its tenants and their

guests. *Taylor v. Gilbert Gertner Enterprises,* 466 S.W.2d 337, 341 (Tex. Civ. App. — Houston [1st Dist.] 1971, writ ref'd n.r.e.).[2]

1. Michael L. Durham, P.C.

Michael L. Durham, P.C.s' submissions, including the Lockwood invoices for the storage of Durham's medical supplies, evidence the first coverage requirement, that Michael L. Durham, P.C., in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement and Lockwood's oral representations that it had insurance which covered the property of Michael L. Durham, P.C., is evidence of the second requirement, that Lockwood was responsible for the property of Michael L. Durham, P.C. Michael L. Durham, P.C. has presented uncontroverted evidence that Lockwood orally agreed to provide insurance. This evidence, in and of itself, would compel a conclusion that Lockwood was responsible for the property of Michael L. Durham in the Lockwood warehouse at the time of the loss. The existence of a warehouseman's bailor-bailee relationship between Michael L. Durham, P.C. and Lockwood, however, made Lockwood legally responsible for the property of Michael L. Durham, P.C.

Although Michael Durham characterizes the charges he paid for the storage of his goods as "rent", the relationship between Michael L. Durham, P.C. and Lockwood can only properly be classified as a warehouseman's bailment. The invoices submitted by Durham reflect monthly charges for "storage." Moreover, there is no indication that Durham received an interest in or possession of any part of the Lockwood warehouse in exchange for what he termed "rent." According to Michael Durham, he did

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[2] The findings of fact or conclusions of law set forth herein are relevant to this litigation only with respect to Lockwood's implied or inherent responsibility for the property in the Lockwood warehouse. Neither the findings of fact nor conclusions of law affect any of the claimant's rights against Lockwood for negligence.

not have a fixed and specific area in the warehouse that he could call his own. Deposition of Michael L. Durham, at 32-33, attached as Exhibit "A" to Affidavit of Paul J. Coselli. Lockwood had, in fact, moved his goods to a different location in the warehouse on two separate occasions. Deposition of Michael L. Durham, at 32-33, attached as Exhibit "A" to Affidavit of Paul J. Coselli. Because there is no evidence to indicate that Lockwood, in exchange for monthly payments, transferred an interest in the warehouse to Michael L. Durham, P.C., the Master finds that the relationship between Lockwood and Michael L. Durham, P.C. was that of bailor and bailee. Given that relationship, Lockwood was legally responsible for the property of Michael L. Durham, P.C. that was stored in the Lockwood warehouse.

2. Vista Chemical

Vista Chemical's submissions, including the Lockwood invoices for the storage of Vista Chemical's alumina and alumina byproducts evidence the first coverage requirement, that Vista Chemical, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The warehouseman's bailor-bailee relationship created by this storage arrangement and the oral representations made by Lockwood's predecessor in interest that insurance would be provided which covered the property of Vista Chemical is evidence of the second requirement, that Lockwood was responsible for the property of Vista Chemical. In his affidavit, Glen Telge, the person in charge of Off-Site Manufacturing and Distribution for Vista Chemical, states he was told that adequate insurance would be maintained to cover any losses to the property Vista stored in the Lockwood warehouse. Affidavit of Glen Telge at 2. Given the uncontroverted nature of this evidence, and Lockwood's assumption of responsibility for Vista's property by virtue of the promise to maintain adequate insurance, Lockwood can be said to have been "responsible" for Vista's property within the meaning of the Marine Indemnity policy.

Additionally, the existence of a bailor-bailee relationship between Vista Chemical and Lockwood made Lockwood legally responsible for Vista Chemical's property. Vista Chemical does not specifically characterize its relationship with Lockwood as either a lease or bailment. Glen Telge simply states in his affidavit: "Vista contracted for the right to store materials at the warehouse in return for the payment of a monthly rental." Affidavit of Glen Telge at 2. As Telge states that Lockwood was to store its property and as Telge in no way indicates that Vista Chemical received a specific interest or right of possession in the warehouse, Vista Chemical's relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was "responsible" for Vista Chemical's property.

3. Third Coast Packaging

Third Coast Packaging's submissions, including the Lockwood invoices for the storage of Third Coast Packaging's reclaimed industrial canning equipment evidence the first coverage requirement, that Third Coast Packaging, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The warehouseman's bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of Third Coast Packaging. In its submissions, Third Coast Packaging states that it dealt directly with Lockwood for the storage of its equipment. Additionally, the Lockwood invoices show that Third Coast Packaging paid Lockwood for storing its goods. As there is no evidence to indicate that Third Coast received a specific interest in or possession of the warehouse such that a lease was created, Third Coast's relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was "responsible" for Third Coast's property.

4. The Fritz Companies/Snavley Forest Products

The Fritz Companies' submissions, including the Lockwood invoices for the storage of The Fritz Companies' Swedish pine evidence the first coverage requirement, that The Fritz Companies, in accord with Lockwood's business as a warehouse and storage facility, placed Snavley Forest Products' property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of The Fritz Companies. In its submissions, The Fritz Companies states that it "contracted with Lockwood Warehouse & Storage for the storage of the Snavley Forest Products lumber." Affidavit of Berlin Edward at 2. Additionally, the Lockwood invoices show that The Fritz Companies paid Lockwood for the storage of Snavley Forest Products' goods. As there is no evidence to indicate that The Fritz Companies received a specific interest in or possession of the warehouse such that a lease was created, The Fritz Companies' relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was legally "responsible" for Snavley Forest Products' property.

5. Oxid, Inc.

The submissions of Oxid, Inc., including the Lockwood invoices for the storage of Oxid's chemicals, evidence the first coverage requirement, that Oxid, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of Oxid. In its submissions, Oxid states that its goods were stored by Lockwood in the Lockwood warehouse. Affidavit of Mac L. Medlen. Additionally, the Lockwood invoices show that Oxid paid Lockwood for storage. As there is no evidence to indicate that Oxid received a specific interest in or possession of the warehouse such that a lease was created, Oxid's relationship with Lockwood can only be construed as a bailment. Given the

bailment relationship, Lockwood was "responsible" for Oxid's property.

6. R.D.A. Trading

The submissions of R.D.A. Trading, including Lockwood invoices for the storage of R.D.A. Trading's atactic polypropylene and correspondence between R.D.A. and Lockwood evidence the first coverage requirement, that R.D.A. Trading, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of R.D.A. Trading. The correspondence submitted by R.D.A. Trading shows that Lockwood had control over the storage and release of R.D.A.'s goods and was responsible for maintaining the integrity of R.D.A.'s goods.[3] Additionally, the Lockwood invoices show that R.D.A. paid Lockwood for the storage, not for any interest in the warehouse they received. As there is no evidence to indicate that R.D.A. Trading received a specific interest in the warehouse such that a lease was created, R.D.A. Trading's relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was "responsible" for R.D.A. Trading's property.

C. While the property of Ultra Warehouse, Inc. and Custom Form Transportation Systems, may have been to some extent in the care of Lockwood, Lockwood was not "responsible" for that property.

Those who had a written lease agreement with Lockwood for space in the warehouse are not covered by the property damage provisions of the Marine Indemnity policy. These claimants

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[3] In the correspondence, R.D.A. instructed Lockwood as follows: "Please be sure no markings are on boxes or pallets. Made in Mexico is OK. Please also shrink wrap any pallets with loose drums. " Correspondence attached Brief of R.D.A. Trading, Inc. in support of Claim for Portion of Insurance Proceeds.

include Ultra Warehouse, Inc. and Custom Form Transportation Systems.

1. Ultra Warehouse, Inc.

The submissions of Ultra Warehouse, Inc. unequivocally show that Ultra subleased space from Lockwood. The sublease agreement between Ultra and Lockwood shows that Ultra leased 10,000 square feet of space in the Lockwood warehouse for the first month of the agreement, 15,000 square feet for the second month of the agreement and 20,000 square feet of space in the third month and the months thereafter. Exhibit "A" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages. The sublease agreement also shows that it was to incorporate all terms and conditions of the master lease between Grand Lockwood Partners Limited Partnership and Lockwood, including the provision relating to insurance. The master lease provided with respect to insurance:

> Lessor and Lessee, in their own behalf and in behalf of their insurers, each hereby waive any and all claims such party may have against the other party during the Term for any and all loss of, or damage to, any of such party's property located within or upon, or constituting a part of the Leased Premises or the Building to the extent that such loss or damage is or could have been covered by a standard Texas fire and extended coverage insurance policy, regardless of cause or origin, including the negligence (sole or otherwise), of such other party hereto.

Exhibit "A", at Article VIII, attached to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

> To the extent Ultra's property was in the warehouse for which Lockwood provided fire protection, building security, maintenance, and housekeeping, Ultra's property can be said to have been in Lockwood's care. However, given that the relationship between Lockwood and Ultra was a sublease and given that the sublease incorporated the insurance term of

the master lease which exonerates Lockwood and its insurers from any property damage claims, Lockwood cannot be said to have been "responsible" for Ultra's property.

As set forth above, a lessor has duties to his lessee with respect to the premises. There is no inherent or implied duty of a lessor with regard to the personal property of a lessee that is kept on the leased premises. The cases cited by certain Defendants, in which they argue that Lockwood, as a lessor, had a responsibility and a duty with respect to the property they stored in their leased space, are applicable to a lessor's responsibility and duty for the premises, not a responsibility and duty for the personal property kept on the premises. In *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) and *Montelongo v. Goodall*, 788 S.W.2d 717 (Tex. App. — Austin 1990, no writ), Texas courts speak of the duty of ordinary care owed by the lessor to those who are on the leased premises. However, those cases make it clear that the lessor's duty flows to individuals who are on the premises and that such duty arises with respect to the maintenance of the premises. Neither of those cases deals with a lessors duty or responsibility with respect to personal property kept on the leased property by the lessee. Because Lockwood's landlord-tenant relationship with Ultra does not make it legally responsible for the personal property Ultra kept on the leased premises, and because the sublease agreement and incorporated master lease provisions make it clear that Lockwood did not assume any responsibility for the property Ultra kept on the leased premises, coverage is not available for Ultra under the Marine Indemnity policy.

2. Custom Form Transportation Systems

The submissions of Custom Form Transportation Systems, Inc. unequivocally show that Custom Form, from April 1, 1993, subleased space from Lockwood. The sublease agreement between Ultra and Lockwood shows that Ultra leased 16,320 square feet of space in the Lockwood warehouse. Exhibit "F" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages &

Priority of Claims to Interplead Funds. The sublease agreement also shows that it was to incorporate all terms and conditions of the master lease between Grand Lockwood Partners Limited Partnership and Lockwood, including the provision set forth above relating to insurance.

To the extent Custom Form's property was in the warehouse for which Lockwood provided fire protection, building security, maintenance, and housekeeping, Custom Form's property can be said to have been in Lockwood's care. However, given that the relationship between Lockwood and Custom Form was a sublease and given that the sublease incorporated the insurance term of the master lease which exonerates Lockwood and its insurers from any property damage claims, Lockwood cannot be said to have been "responsible" for Custom Form's property. Although Custom Form has submitted evidence of a previous lease it entered into with Lockwood's predecessor in interest, Shaft Warehouse & Storage, Inc., that sublease is just as specific in its disavowal of any responsibility for the property of Custom Form that was stored on the leased premises.

Because Lockwood's landlord-tenant relationship with Custom Form does not make it legally responsible for the personal property Custom Form kept on the leased premises and because the sublease agreement and incorporated master lease provisions make it clear that Lockwood did not assume any responsibility for the property Custom Form kept on the leased premises, coverage is not available for Custom Form under the Marine Indemnity policy.

D. The property of Simpson Paper Company, H. Muelstein & Co., Inc., Enterplast, Inc., and Citation Sales & Marketing which was lost in the warehouse fire, was not property that was "*directly* connected with [Lockwood's] business while in [Lockwood's] care, custody or control" and was not property for which Lockwood was "responsible."

Those who had no direct relationship with Lockwood either through a lease or bailment agreement are not covered by the property damage provisions of the Marine Indemnity policy. These claimants include Simpson Paper Company, H. Muelstein & Co., Inc., Enterplast, Inc., and. Citation Sales & Marketing, Inc.

1. Simpson Paper Company

The submissions of Simpson Paper and Ultra Warehouse show that Simpson entered into a warehouseman's contract, a type of bailment agreement, with Ultra Warehouse for the storage of its paper in the Lockwood warehouse. Although Lockwood's provision for fire protection, building security, maintenance, and housekeeping for the entire warehouse supports the conclusion that Lockwood assumed some care for all the property in the warehouse, Simpson Paper has not and cannot show that its property which was in the warehouse at the time of the fire was "directly" connected with [Lockwood's] business. Simpson Paper had no direct relationship or involvement with Lockwood. The presence of its property in the warehouse was the result of its bailment agreement with Ultra. As Simpson Paper had no direct relationship or involvement with Lockwood, its property which was lost in the fire cannot be said to have been directly connected with Lockwood's business. Thus, Simpson has not met the first coverage requirement.

Simpson also has not and cannot meet the second coverage requirement. Simpson has not shown that it had any relationship with Lockwood upon which Lockwood could have been legally responsible for Simpson Paper's property. There is no evidence

that Lockwood even knew that Simpson's property was being stored in the warehouse. Moreover, the terms of the warehouseman's agreement show that Ultra, the actual bailee of Simpson's goods, disavowed any responsibility for loss or damage to the goods, however caused. Exhibit B and C of Ultra. If, by terms of the warehouseman's agreement, Ultra, the actual bailee of the property was not responsible, Lockwood, which disavowed any responsibility for the goods of its own sublessee Ultra, See supra at IV.C.1., cannot be said to have been responsible for goods Ultra stored for others.

Because the property Simpson Paper lost in the fire was not directly connected to Lockwood's business and because there is no factual or legal basis upon which Lockwood could be found responsible for Simpson's property, coverage is not available for Simpson Paper under the Marine Indemnity policy.

2. H. Muelstein & Co., Inc.

The situation of H. Muelstein & Co. Inc. is nearly identical to that of Simpson Paper. Muelstein entered into a warehouseman's contract with Ultra Warehouse for the storage of its packaged plastic materials in the Lockwood warehouse. Lockwood's provision for fire protection, building security, maintenance, and housekeeping for the entire warehouse supports the conclusion that Lockwood assumed some care for all the property in the warehouse, including that of Muelstein. However, because Muelstein did not have a direct relationship with Lockwood, its property which was in the warehouse at the time of the fire cannot be said to have been "directly" connected with [Lockwood's] business. Thus, as with Simpson Paper, Muelstein cannot meet the first coverage requirement.

Similarly, Muelstein has not met the second coverage requirement because there is no evidence that Muelstein had any type of relationship with Lockwood upon which Lockwood could have been legally responsible for Muelstein's property. As with Simpson, Muelstein has not presented any evidence that Lockwood

knew that its property was being stored in the warehouse. Moreover, Muelstein entered into the same warehouseman's agreement with Ultra as did Simpson. If Ultra, the actual bailee of the property, was not responsible for the property, Lockwood, which had no relationship to Muelstein or Muelstein's property and which had no responsibility for the goods of its own sublessee Ultra, cannot be said to have been responsible for the goods of others that Ultra stored.

Because the property Muelstein lost in the fire was not directly connected to Lockwood's business and because there is no factual or legal basis upon which Lockwood could be found responsible for Muelstein's property, coverage is not available for H. Muelstein & Co. under the Marine Indemnity policy.

3. Enterplast, Inc.

Enterplast is in the same type of situation as Simpson Paper and Muelstein. The only real differences are that Enterplast entered into a bailment relationship with Lance Cowan d/b/a Shippers International and there was no written agreement in which the bailee disavowed responsibility for the bailor's property. As shown by the submissions of Enterplast, Lance Cowan d/b/a Shippers International entered into a sublease agreement with Lockwood dated August 1, 1993. Lance Cowan d/b/a Shippers International, in turn, orally agreed to store Enterplast's rubber products in the Lockwood warehouse.

Lockwood's provision for fire protection, building security, maintenance, and housekeeping for the entire warehouse supports the conclusion that Lockwood assumed some care for all the property in the warehouse, including that of Enterplast. However, because Enterplast did not have a direct relationship with Lockwood, its property which was in the warehouse at the time of the fire cannot be said to have been "directly" connected with Lockwood's business. Thus, Enterplast cannot meet the first coverage requirement. Similarly, Enterplast cannot meet the second coverage requirement because there is no evidence that

Lockwood was legally or factually responsible for Enterplast's property. The cases cited by Enterplast in support of its argument that Lockwood was responsible for its property apply, as discussed above, to Lockwood's responsibility for the premises, not for the personal property stored on those premises. Moreover, Enterplast's argument that Section 7.204 of the Texas Business and Commerce Code, which sets forth the duty of a warehouseman, makes Lockwood responsible for all the goods in the warehouse, is without merit. The statute provides:

> A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise would under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

TEX. BUS. & COMM. CODE § 7.204. Given Enterplast's admission that its storage agreement was with Lance Cowan d/b/a Shipper's International, not with Lockwood, Lockwood is not bound by Section 7.204 of the Texas Business and Commerce Code and is not thereby "responsible" for Enterplast's goods.

Because the property Enterplast lost in the fire was not directly connected to Lockwood's business and because there is no factual or legal basis upon which Lockwood could be found responsible for Enterplast's property, coverage is not available for Enterplast, Inc. under the Marine Indemnity policy.

4. Citation Sales & Marketing, Inc.

Given its vague and brief submissions, the Master concludes that Citation Sales & Marketing, Inc., has not met its burden of establishing coverage under the Marine Indemnity policy. From what was submitted, the presence of Citation's property in the warehouse has not been sufficiently explained. Although there is deposition testimony that Citation's property was placed in the warehouse by The Fritz Companies, there is no evidence as to the relationship between The Fritz Companies and Lockwood with

respect to Citation's goods. Unlike the situation in which The Fritz Companies stored lumber for Snavley Forest Products, Lockwood being fully aware of the arrangement and charging the Fritz Companies for the storage of Snavely Products' lumber, Exhibit "F" to Fritz Companies, Inc. and Snavley Forest Products, Inc.'s Brief and Affidavit in Support of their Claim, there is no evidence that Lockwood was aware that Citation had goods in the warehouse. As there is no evidence that Citation's property which was in the warehouse at the time of the fire was "directly" connected with Lockwood's business and no evidence that Lockwood was either legally or factually responsible for Citation's goods, coverage is not available for Citation under the Marine Indemnity policy.

E. The clean-up and debris removal costs incurred by Grand Lockwood Partners Limited Partnership are covered by the debris removal clause of the Marine Indemnity policy

The debris removal clause in the policy provides coverage for expenses incurred in the removal of debris occasioned by loss or damage. Exhibit "A" at 6, attached to Complaint for Interpleader. As Grand Lockwood Partners Limited Partnership expended funds to clean up and remove debris following the Lockwood warehouse fire, the costs that were incurred by Grand Lockwood Partners Limited Partnership are covered by the Marine Indemnity policy.

F. Lockwood's claim for damage to property betterments and improvements is covered

Lockwood made a claim under the policy of $56,390 for damage to improvements and betterments. These losses are clearly covered under the policy as losses to "improvements and betterments to buildings occupied, but not owned by the Insured." *See supra* at IV.

VII. CONCLUSIONS OF LAW ON THE PRIORITY OF CLAIMS

As the foregoing covered claims exceed the amount of the interpled funds, the priority of coverage must be determined. The only language in the policy which can be construed as creating a priority among the claimants is the it "other insurance" clause. Under that other insurance clause, the Marine Indemnity policy was to be excess to all other available insurance. Construing the other insurance clause liberally to provide for maximum coverage, the Master concludes that those claimants who have losses which were not insured by other insurance are entitled to first priority under the policy. To the extent all uninsured claims cannot be satisfied from the interpled funds, equity dictates that those claimants, which are covered by the policy and to the extent they are uninsured, share the proceeds of the interpled funds on a pro rata basis.

The other insurance clause provides:

> If at the time of loss, or damage, there is available to a named or unnamed insured or any other interested party any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance over such other insurance.

Exhibit "A" at 10, attached to Complaint for Interpleader. Although an entire body of law is implicated by the other insurance clause,[4] which in many cases conflicts with the other insurance clauses in the other insurance policies held many claimants, that body of law is not controlling in this proceeding. First, there is no Texas case law which addresses the situation

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[4] The leading cases in Texas on conflicting other insurance clauses are: *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *Liberty Mut. Ins. Co. v. U.S. Fire Ins. Co.*, 590 S.W.2d 783 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.); *Carrabba v. Employers Casualty Co.*, 742 S.W.2d 709 (Tex. App. — Houston [14th Dist.] 1987, no writ); and *Utica Nat'l Ins. Co. v. Fidelity Casualty Co.*, 812 S.W.2d 656, 662 (Tex. App. — Dallas 1991, writ denied).

presented herein, that of numerous insurance claimants vying for payment under a policy with limited funds available. Second, in most instances, the claimants to other insurance were paid for their property damage without regard to the apparent conflicts between the other insurance clauses. Third, the potential for some claimants to experience a windfall upon the application of Texas law regarding conflicting other insurance clauses, goes against the equitable considerations upon which this interpleader action is based. For these reasons and the additional reason that the uninsured claims of those claimants who are covered under the Marine Indemnity policy exceed the funds available, conflicts among other insurance clauses will not be considered.

While the Marine Indemnity policy itself suggests the solution of the priority issues to be resolved herein, the alternate theories for priority are deserving of discussion. The second such theory, that those with written agreements for insurance should have priority over those with oral agreements for insurance and those without any agreement regarding insurance, is not supported by the insurance policy language or Texas case law. The third priority theory, advanced by some Defendants, that those with agreements for insurance should have priority over those without any agreement for insurance, suffers from the same lack of support in either the insurance policy or Texas case law. The cases cited by various Defendants in support of the second and third theory, *Tillerson v. Highrabedian,* 503 S.W.2d 398 (Tex. Civ. App. — Houston [14th Dist.] 1973, writ ref'd n.r.e.) and *Farmers Ins. Exchange v. Nelson,* 479 S.W.2d 717 (Tex. Civ. App. — Waco 1972, writ ref'd n.r.e.), are neither applicable nor controlling.

In *Tillerson,* the plaintiff entered into a construction contract with Defendant, in which Defendant was to construct Plaintiff's residence. The parties agreed that the plaintiff was to acquire builder's risk insurance, which was to protect the plaintiff, the defendant, and the bank which was financing the project. Plaintiff acquired builder's risk insurance, but only named himself as an

insured. The house was nearly completed when it was destroyed by fire. When plaintiff collected all the insurance proceeds, Defendant moved to have the insurance policy reformed to name him as an additional insured. After determining that Defendant had an insurable interest in the construction project, the Texas Court of Appeals set forth the law on the issue:

> When one of two parties, each of whom has an insurable interest in a particular property, agrees to get insurance for the protection of both interests, but does, in fact, procure a policy naming only himself as insured, and the property is damaged or destroyed, the other party, as between the two, is entitled to the proceeds of the policy up to the extent of his loss.

Tillerson, 503 S.W.2d at 400. In *Farmers,* a building and its contents were leased by Charles D. Nelson to Meredith Twomey, who used the building as a restaurant. Pursuant to the lease agreement, Twomey agreed to procure insurance on the building and its contents, naming the owner of the building as an additional insured. Insurance was acquired on the building but the lessor, Charles Nelson, was not named as an additional insured. When the building and its contents were destroyed by fire, Twomey, who moved her belongings out of the building prior to the fire, did not attempt to recover under the policy. Although the owner of the building tried to recover under the policy, the insurance company denied his claim, maintaining that because he was not listed as an insured under the policy he could not recover. In determining that the owner of the building could recover under the policy the Texas Court of Appeals stated:

> We hold that a breach by a lessee of a contract to insure the leased property for the benefit of his lessor will charge the benefits of any insurance taken out by the lessee on the property with a lien in favor of the lessor; and that the lessor may proceed directly against the insurer to provide his pro rata share of any funds payable under the policy.

Farmers, 479 S.W.2d at 721.

These cases are neither applicable nor controlling for three reasons. First, these cases deal with the priority of claims between a party who has agreed to acquire insurance and a party for whose benefit the insurance was to be acquired. In the instant case, the priority issue is based on conflicting claims between multiple parties all of whom were to benefit from the insurance that was to be acquired by Lockwood. Thus, neither *Tillerson* nor *Farmers* speaks to the priority issues before the Court in this case. Second, in *Tillerson* and *Farmers,* the fundamental issue was whether a party who was not named as an additional insured on an insurance policy was covered by the policy. In the instant case, the Marine Indemnity policy specifically extended coverage to those who were not named as additional insureds by providing coverage for those who lost property that was directly connected with Lockwood's business while in Lockwood's care, custody and control and for which Lockwood was responsible or had agreed in writing to insure. Third and finally, in *Tillerson* and *Farmers,* the insurance that was acquired covered all losses claimed by those with insurable interests. In the instant case, however, there is admittedly not enough insurance to satisfy the claims of those with an insurable interest. Because neither *Tillerson* nor *Farmers* dealt with the priority of claims in a situation in which the available insurance was not sufficient to satisfy all the valid claims, those cases cannot control the resolution of this dispute. Moreover, given the facts and holdings of *Tillerson* and *Farmers,* Defendants' arguments that these cases compel an award of priority to those who had agreements with Lockwood for insurance coverage are without merit.

Although a resolution of this interpleader action is to be determined, to the extent possible, by the policy language or controlling law, equitable considerations may guide the Court in determining the proper distribution of the funds at issue in this case. In reliance on the policy language regarding other insurance and considerations of equity, the Master concludes that the

distribution of the interpled funds should be on a pro rata basis among the claimants who were uninsured to any degree.

With respect to the arguments that Grand Lockwood Partners Limited Partnership should not receive any share in the interpled funds or should have last priority, as a result of allegations that its negligence caused or contributed to the warehouse fire under an unclean hands theory, the Master finds that this is not the appropriate forum for litigating the issue of the Partnership's negligence. As there are cases pending in state court against the Partnership, issues of negligence should be resolved in those courts. At issue in this case is coverage under the policy and distribution of the interpled insurance policy proceeds. With respect to those issues, the Partnership has shown itself to be both covered by the Marine Indemnity policy, and uninsured. Thus, the Partnership, under the terms of the policy itself, is entitled to share in the insurance policy proceeds.

With respect to the arguments that Lockwood Warehouse and Storage should be required to return the $56,390 which it was paid for its betterment and improvement losses, also under an unclean hands theory, the Master also concludes that this forum, for the reasons set forth above, is not appropriate for litigating the issue of Lockwood's negligence. Moreover, even if this were an appropriate forum, the Order dismissing Lockwood from this action has prevented Lockwood from defending itself against the unclean hands allegations and claims. To the extent Lockwood's losses were covered by the Marine Indemnity policy and to the extent the Court has already approved of the distribution of funds Lockwood received, Lockwood will not be required to return any of the funds it received from Marine Indemnity.

VIII. CONCLUSIONS OF LAW ON CALCULATION OF DAMAGES

The calculation of damages for each claimant found to be covered by the Marine Indemnity policy is based on the terms of the policy. Relevant to the calculation of damages is the measure

of value set forth in the policy as "actual cash value" for property losses, the policy's explicit exclusion of economic losses, including, "delay, loss of market, loss of use; interruption of business," and the policy's $5,000 deductible for each claim made.

1. Kraft General Foods, Inc.

Of Kraft's $8,264,165 loss, $786,117 was loss associated with Kraft's business interruption, and $76,804 was loss associated with additional expenses, including transportation and storage charges. Both of those losses were covered by Kraft's other insurance, leaving Kraft with a $1,000,000 loss representative of its deductible under its other insurance policies. Taking into account the $5,000 deductible under the Marine Indemnity policy, Kraft General Foods' damages are $995,000.

2. IGI Baychem

Of IGI Baychem's $493,873.58 loss, $393,873.58 was covered IGI Baychem's other insurance, with the remaining $100,000 in loss representing the deductible under IGI Baychem's other insurance. Taking into account the $5,000 deductible under the Marine Indemnity policy, IGI Baychem's damages are $95,000.

3. Atlantis International

All of Atlantis International's $72,451.03 loss was covered by insurance other than the Marine Indemnity insurance. Thus, Atlantis International has no compensable damages.

4. Michael L. Durham, P.C.

Michael L. Durham, P.C. claims a loss of $450,000, none of which was covered by insurance. The basis of that loss figure is a contract between Michael L. Durham, P.C. and Marshall Davis d/b/a Maheda in which Marshall Davis d/b/a Maheda agreed to pay Michael L. Durham, P.C. $450,000 in cash for the medical supplies which were stored in the warehouse. Given that two previous contracts for the sale of the medical supplies had fallen through, and given that Michael L. Durham, P.C. purchased the goods for $187,000 and took a $224,000 loss on the medical

supplies in 1993, the $450, 000 value placed by Michael L. Durham, P.C. on the property it lost is excessive. As the tax loss of $224,000 is the most objective value of the medical supplies, that value will be used to determine the losses of Michael L. Durham, P.C. Taking into account the $5,000 deductible under the Marine Indemnity policy, Michael L. Durham, P.C.'s damages are $219,000.

5. Vista Chemical

Of Vista Chemical's $1,512,634 loss, $309,837.60 was paid by Vista Chemical's own insurers. Taking into consideration the $309,837.60 which has been paid and the $5,000 deductible under the Marine Indemnity policy, Vista Chemical's damages are $1,197,796.40.

6. Third Coast Packaging

Third Coast Packaging had other insurance, but that insurance did not cover its losses, $66,750, from the Lockwood warehouse fire. Taking into consideration the $5,000 deductible under the Marine Indemnity policy, Third Coast's damages are $61,750.

7. The Fritz Companies/Snavley Forest Products

Of the $33,322.60 loss incurred by Snavley Forest Products, $29,000 was paid by Snavley's other insurance. The remaining loss of $4,322.60, when measured against the $5,000 deductible under the Marine Indemnity policy, leaves Snavley Forest Products with no compensable damages.

8. Oxid, Inc.

As Oxid's deductible under its other insurance is $100,000, Oxid's loss of $32,200 is not covered by other insurance. Thus, Oxid Inc.'s damages are $27,200, when the $5,000 deductible under the Marine Indemnity policy is taken into consideration.

9. R.D.A. Trading, Inc.

R.D.A. Trading had no insurance of its own to cover the $81,201.55 loss it incurred. Taking into consideration the $5,000

deductible under the Marine Indemnity policy, R.D.A. Trading's damages are $76,201.55.

10. Grand Lockwood Partners Limited Partnership

Grand Lockwood Limited Partnership, to the extent it did not have its own insurance which covered the costs of debris removal and clean-up, and taking into consideration the $5,000 deductible under the Marine Indemnity policy, has damages of $279,000.

IX. RECOMMENDED DISTRIBUTION OF INTERPLED FUNDS

Given the foregoing, the Master RECOMMENDS that the interpled funds, $1,275,610.00, plus interest at 6% to date of distribution, be distributed pro rata among the uninsured and covered claimants in the following proportions:

1. Kraft General Foods, Inc.: 33.72% of the interpled funds plus interest;[5]

2. IGI Baychem: 3.22% of the interpled funds plus interest;[6]

3. Michael L. Durham, P.C.: 7.42% of the interpled funds plus interest;[7]

5. Vista Chemical: 40.59% of the interpled funds plus interest;[8]

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[5] Kraft's pro rata share of the interpled funds is calculated as follows: $995,000 (Kraft's covered claim) ÷ $2,950,947.95 (total covered claims) = 33.72%

[6] IGI Baychem's pro rata share of the interpled funds is calculated as follows: $95,000 (IGI Baychem's covered claim) ÷ $2,950,947.95 (total covered claims) = 3.22%

[7] Michael L. Durham, P.C.'s pro rata share of the interpled funds is calculated as follows: $219,000 (Michael L. Durham P.C.'s covered claim) ÷ $2,950,947.95 (total covered claims) = 7.42%

[8] Vista Chemical's pro rata share of the interpled funds is calculated as follows: $1,197,796.40 (Vista Chemical's covered claim) ÷ $2,950,947.95 (total covered claims) = 40.59%

6. Third Coast Packaging: 2.09% of the interpled funds plus interest;[9]

7. Oxid, Inc.: .92% of the interpled funds plus interest;[10]

8. R.D.A. Trading, Inc.: 2.58% of the interpled funds plus interest;[11]

9. Grand Lockwood Partners Limited Partnership: 9.46% of the interpled funds plus interest.[12]

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[9] Third Coast Packaging's pro rata share of the interpled funds is calculated as follows: $61,750 (Third Coast Packaging's covered claim) ÷ $2,950,947.95 (total covered claims) = 2.09%

[10] Oxid, Inc.'s pro rata share of the interpled funds is calculated as follows: $27,200 (Oxid Inc.'s covered claim) ÷ $2,950,947.95 (total covered claims) = .92%

[11] R.D.A. Trading's pro rata share of the interpled funds is calculated as follows: $76,201.55 (R.D.A. Trading's covered claim) ÷ $2,950,947.95 (total covered claims) = 2.58%

[12] Grand Lockwood Partner Limited Partnership's pro rata share of the interpled funds is calculated as follows: $279,000 (Grand Lockwood Partners Limited Partnership's covered claims) ÷ $2,950,947.95 (total covered claims) = 9.46%

X. CONCLUSION

Within ten days after being served with this Report and Recommendation, any party may, pursuant to FED. R. CIV. P. 56(e)(2) file written objections to the Report and Recommendation. The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208 and a copy must be delivered to the Chambers of Judge Harmon, Room 9114, and to the Chambers of Magistrate Judge Stacy, Room 7727, Federal Building, 515 Rusk, Houston, Texas 77002.

Signed at Houston, Texas, this 29th day of December, 1995.

FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE,	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION
	§	NO. H-94-2430
LOCKWOOD WAREHOUSE & STORAGE, THIRD COAST PACKAGING, SNAVELY FOREST PRODUCTS, INC., MICHAEL DURHAM, IGI BAYCHEM, INC., INTEGRATED LABS, ATLANTIS INTERNATIONAL COMMODITIES, INC., OXID, INC., R.D.A. INTERNATIONAL, INC., VISTA CHEMICAL,, PHOENICIAN ENTERPRISES, INC., MAXWELL HOUSE COFFEE COMPANY, SHIPPERS INTERNATIONAL, INC., CXI, INC., ULTRA WAREHOUSE, INC., CITATION CORPORATION, FRITZ COMPANIES, INC., GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP, and INTEGRATED FURNITURE & EQUIPMENT,	§	
Defendants.	§	

ERRATA SHEET SUPPLEMENTING THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

After considering the objections filed by the parties, and recognizing certain typographical errors, the Magistrate Judge submits the following errata sheet supplementing the Special Master's Report and Recommendation.

1. Finding of Fact 50 on page 17 should read:

> Packaged plastic materials, with a cost of $547,546.63, which were being stored in the Lockwood warehouse by H. Muelstein & Co., Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Martin Zielonka. The net sales value of the lost packaged plastic materials was $1,078,233. Affidavit of Gary Markelon, attached to H. Muelstein & Company's Brief on the Issue of Priority of Claims.

2. Conclusion of Law on Damages 10 on page 50 should read:

> Grand Lockwood Limited Partnership, to the extent it did not have its own insurance which covered the costs of debris removal and clean-up, and taking into consideration the $5,000 deductible under the Marine Indemnity policy, has damages of $379,000.

3. Given the error with respect to the damages of Grand Lockwood Limited Partnership, a recalculation of the recommended distribution of the interpled funds is required resulting in the following change to IX, pages 50-51:

> Given the foregoing, the Master RECOMMENDS that the interpled funds, $1,275,610.00, plus interest at 6% to date, be distributed among the uninsured and covered claimants in the following proportions:
>
> 1. Kraft General Foods, Inc.: 32.61% of the interpled funds plus interest to date;[1]
>
> 2. IGI Baychem: 3.11% of the interpled funds plus interest to date;[2]

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[1] Kraft's pro rata share of the interpled funds is calculated as follows: $995,000 (Kraft's covered claim) ÷ $3,050,947.95 (total covered claims) = 32.61%

[2] IGI Baychem's pro rata share of the interpled funds is calculated as follows: $95,000 (IGI Baychem's covered claim) ÷ $3,050,947.95 (total covered claims) = 3.11%

3. Michael L. Durham, P.C.: 7.18% of the interpled funds plus interest to date;[3]

4. Vista Chemical: 39.26% of the interpled funds plus interest to date.[4]

5. Third Coast Packaging: 2.03% of the interpled funds plus interest to date;[5]

6. Oxid, Inc.: .89% of the interpled funds plus interest to date;[6]

7. R.D.A. Trading, Inc.: 2.50% of the interpled funds plus interest to date;[7]

8. Grand Lockwood Partners Limited Partnership: 12.42% of the interpled funds plus interest to date.[8]

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[3] Michael L. Durham, P.C.'s pro rata share of the interpled funds is calculated as follows: $219,000 (Michael L. Durham P.C.'s covered claim) ÷ $3,050,947.95 (total covered claims) = 7.18%

[4] Vista Chemical's pro rata share of the interpled funds is calculated as follows: $1,197,796.40 (Vista Chemical's covered claim) ÷ $3,050,947.95 (total covered claims) = 39.26%

[5] Third Coast Packaging's pro rata share of the interpled funds is calculated as follows: $61,750 (Third Coast Packaging's covered claim) ÷ $3,050,947.95 (total covered claims) = 2.03%

[6] Oxid, Inc.'s pro rata share of the interpled funds is calculated as follows: $27,200 (Oxid Inc.'s covered claim) ÷ $3,050,947.95 (total covered claims) = .89%

[7] R.D.A. Trading's pro rata share of the interpled funds is calculated as follows: $76,201.55 (R.D.A. Trading's covered claim) ÷ $3,050,947.95 (total covered claims) = 2.50%

[8] Grand Lockwood Partners Limited Partnership's pro rata share of the interpled funds is calculated as follows: $379,000 (Grand Lockwood Partners Limited Partnership's covered claim) ÷ $3,050,947.95 (total covered claims) = 12.42%

These corrections shall be incorporated into the Special Master's Report and Recommendation.

Signed at Houston, Texas, this 6th day of February, 1996.

FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE